

LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

①

DTIC ACCESSION NUMBER

LEVEL

INVENTORY

Child Neglect in the Military Community...

DOCUMENT IDENTIFICATION

Apr 95

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

ACCESSION BY	
NTIS	GRAM <input checked="" type="checkbox"/>
DTIC	TRAC <input type="checkbox"/>
UNANNOUNCED	<input type="checkbox"/>
JUSTIFICATION	
BY	
DISTRIBUTION/	
AVAILABILITY CODES	
DISTRIBUTION	AVAILABILITY AND/OR SPECIAL
<i>R</i>	

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

REGISTERED OR CERTIFIED NUMBER

DATE RECEIVED IN DTIC

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

H
A
N
D
L
E

W
I
T
H

C
A
R
E

20061026097

**CHILD NEGLECT IN THE MILITARY COMMUNITY:
ARE WE NEGLECTING THE CHILD?**

A Thesis
Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

by Major Lisa M. Schenck
United States Army

43D JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1995

Published: 148 Mil. L. Rev. 1 (1995).

CHILD NEGLECT IN THE MILITARY COMMUNITY:

ARE WE NEGLECTING THE CHILD?

by Major Lisa M. Schenck

ABSTRACT: This thesis examines the lack of criminal standards for child neglect in the military community. It shows the need for uniform criminal standards to provide notice of parental responsibilities, to promote fairness, to ensure options for commanders, to maintain unit readiness and discipline, and to maintain unit and community morale and welfare. This thesis argues that although a prevalent problem in the military community, child neglect is disregarded and handled through ineffective, incomplete administrative and rehabilitative measures. If punitive sanctions are sought, the military is forced to rely on inconsistent state statutes. In the absence of state statutes, such as outside the United States, without punitive statutory or regulatory provisions, and in the absence of physical injury, the crime may go unpunished. In response, this thesis concludes that the most realistic and expedient solution is an executive branch initiative that implements punitive provisions criminalizing the three most common forms of child neglect: abandonment, endangerment, and deprivation of necessities. Such action would provide uniform standards for the military community and limit disparate treatment within our disciplined society.

TABLE OF CONTENTS

I.	Introduction	3
II.	Defining Child Neglect	8
	A. Criminal Versus Civil Child Neglect: Different Goals Require Different Definitions	9
	B. How the Military Defines Child Neglect	13
III.	The Military Mirrors Society: A Delay in Interest and Intervention	17
	A. The Lack of National Attention to the Problem of Child Neglect	17
	B. The Military's Delayed Response	19
IV.	The Military's Neglect of Child Neglect	20
	A. The Armed Forces' Approach to Solving Child Neglect: Family Advocacy Programs-The Military's Child Welfare Agencies?	21
	1. DOD Guidance: What Are the "Uniform" Objectives for the Uniformed Services?	23
	2. Individual Service Programs-Policies and Objectives	24
	B. A Federal Legislative Void Adversely Affects the Military's Response	26
	1. Federal Child Neglect Legislation	26
	a. The Absence of Federal Offenses	27
	b. The Federal Assimilative Crimes Act.	28
	c. Problems in Areas of Exclusive Federal Legislative Jurisdiction	32
	2. Difficulties Overseas	36
	a. Cultural Differences Cause Difficulties	36
	b. Civilian Offenders: Crime Without Punishment Under United States Law	37

C.	Prosecuting Army Service Members for Child Neglect Under the UCMJ: No Injury - No Charge	40
1.	Entering the "Morass" of Child Neglect, Absent a Statute or Punitive Regulatory Provision	41
2.	Applying the Punitive Articles "As Is".	49
3.	A Trend in Prosecution of Parental Omissions	52
D.	The Failure of Adverse Administrative Actions.	54
1.	Attempts at Installation Policies and Regulations	54
2.	Withdrawal of Privileges and Benefits	55
3.	Adverse Administrative Actions for Service Members Do Not Fill the Gap	56
E.	Empirical Data: Problems Identified Through an Army Survey	58
V.	Why the Military and Society Disregard Child Neglect and Why They Should Not	63
A.	Child Neglect Is Not A "Nebulous and Insignificant" Problem	64
1.	National Incidence of Child Neglect	64
2.	Incidence of Child Neglect in the Military Community	65
B.	Intervention Does Not Disrupt Parental Autonomy.	70
1.	The Legal History of Parental Rights: Balancing Fundamental Personal Liberties of Parents and Children	72
2.	Medical Decision Making: Religious Freedom	76
C.	A Difficult Problem, But Not Futile: A Comparison of State Criminal Child Neglect Statutes	87
1.	Why Should Child Neglect Be Criminalized?.	88
a.	This Is Not a Victimless Crime: Effects on the Child	89

b.	Child Neglect is Conduct "Prejudicial to the Good Order and Discipline of the Armed Forces"	91
2.	State Criminal Child Neglect Statutes Compared.	95
a.	Child Endangerment Statutes	99
b.	Child Abandonment Statutes	101
c.	Criminal Nonsupport or Deprivation Statutes	104
3.	Are Criminal Child Neglect Statutes Void for Vagueness?	106
a.	The Supreme Court's Void for Vagueness Standard	107
b.	Criminal Child Neglect Statutes Withstand Challenge	110
VI.	Possible Solutions: Providing Standards	117
A.	A Proposed Amendment to Title 10: A Proposed Punitive UCMJ Article	119
1.	What a New Punitive Article Will Accomplish	119
2.	What a New Punitive Article Will Not Accomplish	123
B.	A Proposed Amendment to Title 18: The Child Neglect Act of 1996	123
1.	What an Amendment to Title 18 Will Accomplish	123
2.	What an Amendment to Title 18 Will Not Accomplish	126
C.	Proposed Executive Branch Initiatives	126
1.	What Executive Branch Initiatives Will Accomplish	127
2.	What Executive Branch Initiatives Will Not Accomplish	128
VII.	Recommended Action and Why	128

VIII.	Implementation: What Any Action Could Accomplish .	131
IX.	Conclusion	133
Figure 1a	1992 National Statistics of Child Abuse and Neglect	
Figure 1b	1992 National Statistics of Child Abuse and Neglect (Pie)	
Figure 2	1992 Armed Forces CONUS Statistics of Child Abuse and Neglect	
Figure 3	1992 Armed Forces OCONUS Statistics of Child Abuse and Neglect	
Table 1	DOD Child Neglect Statistics FY 1986 - FY 1992	
Table 2	Types of Substantiated Child Abuse & Neglect DOD FY 1990	
Table 3	Types of Substantiated Child Abuse & Neglect DOD FY 1991	
Table 4	Types of Substantiated Child Abuse and Neglect DOD FY 1992	
Chart 1	Criminal Child Neglect Statutes in the 50 States Key to Chart 1- Grounds of Criminal Child Neglect	
Appendix A.	Army Staff Judge Advocate Questionnaire: Summary of Responses	
Appendix B.	Proposed Amendment to Chapter 47 of Title 10, U.S.C.: A Proposed Punitive Article	
Appendix C.	Proposed Executive Order	
Appendix D.	Proposed Amendment to Title 18, U.S.C.: The Child Neglect Act of 1996	
Appendix E.	Proposed DOD General Order	

CHILD NEGLECT IN THE MILITARY COMMUNITY:

ARE WE NEGLECTING THE CHILD?

MAJOR LISA M. SCHENCK*

Ian Thomas Alexander

Born April 20, 1980 - Died January 7, 1981

a result of inadequate nourishment and medical attention, according to medical experts. . . . The child was emaciated . . . his body was positively frigid. Among other things, the physicians suspected that he had been placed in a refrigerator. . . . he [the accused] and his wife would leave the baby unattended at home four or five times a week while they went to the base to 'socialize' . . . they left Ian alone in the apartment while they transacted certain business and 'socialized'

*Judge Advocate General's Corps, United States Army. Presently assigned as a Student, 43d Judge Advocate Officer's Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. B.A., *cum laude*, 1983, Providence College; M.P.A., 1986, Fairleigh Dickinson University; J.D., *cum laude*, 1989, Notre Dame Law School; Formerly assigned as Deputy Staff Judge Advocate, Chief of Criminal Law, Chief of Claims and Legal Assistance, United States Army Aviation Center, Fort Rucker, Alabama, 1991-1994; Acting Command Judge Advocate, Chief of Claims and Legal Assistance, 23d Support Group, Camp Humphreys, Republic of Korea, 1991; Brigade Trial Counsel, 2d Infantry Division, Republic of Korea, 1990; Funded Legal Education Program 1986-1989; Assistant Secretary of the General Staff, Fielding Team Member, Project Officer, Communications-Electronics Command, Fort Monmouth, New Jersey, 1983-1986. Previous publications: Operations and Training Div. Note, *Military Qualification Standards System*, ARMY LAW, Oct. 1989, at 40.

until about 2300 hours that evening pathologists estimated that Ian had been dead for 7 hours at that time and it was not for another 11 hours that the death was discovered.

*United States v. Alexander*¹

Absent a statute or a punitive regulatory provision this court declines to enter the morass which would be created by holding that child neglect, standing alone, constitutes an offense under Article 134, UCMJ.²

1991 opinion of the United States Army Court of Criminal Appeals (ACCA)³ upon reversing a special court-martial conviction for child neglect in violation of Article 134, Uniform Code of Military Justice (UCMJ).⁴

¹18 M.J. 84, 85-86 (C.M.A. 1984).

²*United States v. Wallace*, 33 M.J. 561, 564 (A.C.M.R. 1991) (footnote omitted). At trial, the military judge found the accused guilty by exceptions and substitutions of child neglect, but the ACCA overturned the conviction. See *infra* note 136 (specification alleging that the accused violated his duties of care to his children, then seven, six, and one years of age, by locking them in government quarters and not providing responsible care).

³Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995. The Act redesignated the United States Courts of Military Review for each separate service a United States Court of Criminal Appeals. Therefore, the United States Army Court of Military Review (ACMR) is now the United States Army Court of Criminal Appeals (ACCA). See Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831, (to be codified at 10 U.S.C. § 866). This thesis refers to these courts by their new names.

I. Introduction

Had someone discovered Ian Thomas Alexander before he died, his parents' conduct may have been defined as child neglect. Although experts differ about its definition, the term "child neglect" usually encompasses "a parent's or other caretaker's failure to provide basic physical health care, supervision, nutrition, personal hygiene, emotional nurturing, education, or safe housing. It also includes child abandonment or expulsion, and custody-related forms of inattention to the child's needs."⁵

Unfortunately for Ian, in most cases of criminal child neglect, in the military, convictions only come with death. Numerous court decisions have upheld convictions for unpremeditated murder;⁶ involuntary manslaughter;⁷ and negligent homicide⁸ for extreme child neglect resulting in a fatality.⁹ As

⁴UCMJ art. 134 (1982).

⁵James M. Gaudin Jr., *Effective Intervention With Neglectful Families*, 20 CRIM. JUST. & BEHAV. 66, 67 (1993). Throughout this thesis, the term "child neglect" generally refers to: emotional neglect, abandonment, and the failure to provide: food, shelter, clothing, medical care, supervision, education.

⁶UCMJ art. 118(2) (1984).

⁷*Id.* art. 119.

⁸*Id.* art. 134.

⁹See *United States v. Robertson*, 33 M.J. 832 (A.C.M.R. 1991); *United States v. McGhee*, 33 M.J. 763 (A.C.M.R. 1991); *United States v. Perez*, 15 M.J. 585 (A.C.M.R. 1983); *United States v. Valdez*, 40 M.J. 491 (C.M.A. 1994). Some of these cases involve parents who failed to take action when they knew a caretaker was abusing their child, but continued to place the child in the hands of the abusing caretaker.

the Court of Appeals for the Armed Forces¹⁰ (CAAF) has pointed out, "The notion that parents can be criminally responsible for murdering their children by failing to provide the necessities of life is well established."¹¹

When a child's death results from abuse, prosecutors and commanders may choose from many punitive options; the same is true if a child is injured from physical abuse. However, if authorities discover neglect of a child prior to death, absent evidence of actual physical abuse, punitive options are limited and may vary from jurisdiction to jurisdiction.

In child neglect cases, the military can charge existing provisions in the UCMJ, state statutes (existing or assimilated through the Federal Assimilative Crimes Act),¹² or punitive installation regulations. For example, since Ian Alexander's death occurred off post in Germany, even if authorities had discovered the neglect prior to his death, no state criminal provision would have been available for assimilation; also, no

¹⁰Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals (COMA) as the United States Court of Appeals for the Armed Forces (CAAF). See Nat'l Def. Auth. for Fiscal Year 1995, Publ. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This thesis refers to the court by its new name.

¹¹Valdez, 40 M.J. at 495.

¹²18 U.S.C.A. § 13 (West 1995).

punitive regulation existed on which the government could base a charge of criminal child neglect against a military parent.¹³

Furthermore, based on recent conflicting decisions from the various service courts of criminal appeals, army trial counsel may be unable to successfully prosecute child neglect under Article 134, UCMJ--either clause one (conduct prejudicial to the good order and discipline of the armed forces) or clause two (conduct of a nature to bring discredit upon the armed forces)--while air force trial counsel still have this option.¹⁴ Army trial counsel must resort to other punitive articles and may charge child neglect only if evidence of physical abuse exists or if the state provides some criminal statute for child neglect.

The military's primary response to the problem of child neglect is the Department of Defense (DOD) Family Advocacy Program and the individual services' family advocacy programs that implement the DOD program. However, like child protection agencies, family advocacy programs do not focus on the punitive

¹³In addition, as the court notes in its decision, the mother of the victim "was a German national, and the crimes were committed on German soil." Valdez, 40 M.J. at 496 n.2. The court added, "This Court has no cognizance of what, if any, proceedings were instituted or results obtained against Christina Valdez by appropriate civil authorities." *Id.*

¹⁴UCMJ art. 134 (1984). Compare *United States v. Wallace*, 33 M.J. 561 (A.C.M.R. 1991) (dismissing a clause 1, Article 134 specification for child neglect); *United States v. Foreman*, ACM 28008 (A.F.C.M.R. 25 May 1990) (finding that the accused failed to admit to criminal child neglect in the providence inquiry, but specifically holding that child neglect could be charged under Article 134).

options available to commanders and prosecutors. Family advocacy programs generally do not provide or contemplate punitive measures against perpetrators of child neglect. For example, the DOD program's goal is to protect the child,¹⁵ but actually it is limited in large part to education, rehabilitation, treatment, and monitoring of parents who commit offenses against the child.¹⁶ In contrast, commanders may have different objectives and problems that differ from, and are in addition to, those of the family advocacy program when dealing with crimes soldiers commit against their children.

Problems that occur at home can affect military members, their families, and the readiness of the units. With increased deployments, dual military couples, and increased child care costs, child neglect is likely to increase. Service members, commanders, and prosecutors need established standards for parental responsibilities. Established standards will lessen the

¹⁵DEP'T OF DEFENSE, DIRECTIVE 6400.1, FAMILY ADVOCACY PROGRAM, encl. 2, para. 5 (June 23, 1992) [hereinafter DOD DIR. 6400.1]. Specifically, the family advocacy program is "designed to prevent and intervene in cases of family distress, and to promote healthy family life." *Id.* These are not the same reasons commanders become involved in family problems.

¹⁶*Id.* "Military Family Advocacy Programs within the DOD are designed to prevent, identify, report, intervene, and treat all aspects of child abuse and neglect and spouse abuse." Fact Sheet, Dep't of Defense, subject: DOD Family Advocacy Program (1994) [hereinafter DOD Fact Sheet]. The DOD defines the family advocacy program as "[a] program designed to address prevention, identification, evaluation, treatment, rehabilitation, followup, and reporting of family violence." DOD DIR. 6400.1, *supra* note 15, at encl 2, para. 5.

likelihood of disparate treatment of offenders while providing notice to the military community of parental responsibilities.

This thesis examines the military's inadequate criminal response to the problem of child neglect, and explores available punitive options against military service members and dependent spouses who commit criminal child neglect. This thesis will argue that by providing a uniform standard for parental responsibilities for the armed services, and clear punitive options for commanders, the entire military community will benefit. All parents in the military community will receive adequate, consistent guidance, and criminal liability for parental responsibilities will not vary from installation to installation.

This thesis begins by defining criminal child neglect and reviewing society and the military's delayed response to the problem. The military reluctantly has responded to child neglect through the family advocacy programs and "administrative measures." However, this combined response is incomplete and inconsistent. Furthermore, family advocacy programs and administrative measures cause difficulties in areas of exclusive jurisdiction and fail overseas. Using the results of a survey of army judge advocates as support, this thesis shows how many installations have promulgated regulations that vary widely from location to location, each defining parental responsibilities differently.

Child neglect is an identifiable, harmful, and significant problem. Intervention is warranted and overrides unwarranted constitutional concerns about interfering with the family unit. This thesis illustrates how states overcome constitutional concerns and define criminal child neglect. By reviewing and comparing the state criminal neglect statutes, this thesis explains how state laws are inconsistent and do not fill the void.

Many possible methods to provide the military community uniform standards for parental responsibilities exist. This thesis addresses the following alternatives: a new punitive article for the UCMJ; an additional criminal provision for Title 18; and executive branch initiatives providing punitive options. After recommending a solution, this thesis will illustrate possible ways that the military can use criminal sanctions and how the military community will benefit. This thesis argues that some action is better than none; by providing any uniform standards to the uniformed services, the DOD will improve the present situation.

II. Defining Child Neglect

Child abuse consistently steals public attention away from child neglect. This can partially be explained by the readily apparent wrongfulness of child abuse and the difficulty in

defining child neglect. Deciding when child neglect becomes criminal is not easy. In the past, society has combined child abuse and neglect in one category. However, the terms are not the same. "Abuse usually involves intentional acts of the parents and generally consists of physical, mental, or sexual abuse. Neglect on the other hand, consists of omissions or failure to act or perform a duty that can be performed."¹⁷

The problem of clearly defining the term, "child neglect," pervades all contexts, "whether it be political debate, legislation, agency intervention, research, or community perceptions."¹⁸ Moreover, the definition of child neglect depends on who is using the term and in what context. "Child neglect is a term that encompasses a broad range of conditions for which there is little consistency of definition among practitioners, policymakers, or researchers."¹⁹

A. Civil Versus Criminal Child Neglect: Different Goals Require Different Definitions

State legislatures have codified definitions of child neglect in both civil and criminal statutes. Depending on the goals of the professionals and focus of the statutes involved,

¹⁷Peter J. McGovern, *Redefining Neglect: An American Perspective*, 7 AM. J. FAM. L. 207, 212 (1993).

¹⁸Isabel Wolock & Bernard Horowitz, *Child Maltreatment as a Social Problem: The Neglect of Neglect*, 54(4) AM. J. ORTHOPSYCHIATRY 530, 531 (1984).

¹⁹Gaudin, *supra* note 5, at 67.

the definitions differ. Civil statutes are protective laws subjecting parents to actions such as permanent loss of custody of the child, while penal laws subject them to imprisonment.²⁰

Professionals, such as child protection agencies and lawmakers, appear to focus on parental omissions in care. In contrast, health care professionals focus on the effects on the child.²¹ All parties concerned, however, struggle to define what constitutes basic, minimal, or adequate care of children.²² Within that dilemma lies the conflict between the seriousness and potential harm to the child and parental intent or culpability, versus community conditions for which parents are not responsible.²³ In any case, all parties agree, that parental responsibilities, including moral and legal obligations, are acquired with the birth or adoption of a child, or by marriage (i.e., step parents). Like service members, parents have duties which can, and must, be enforced.

²⁰INSTITUTE OF JUDICIAL ADMINISTRATION AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT 180 (1981) [hereinafter IJA-ABA STANDARDS]. At the time these standards were written, only thirteen jurisdictions had criminal penalties for child neglect and nineteen jurisdictions had civil penalties for child neglect. *Id.*

²¹Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8, 11 (1993).

²²Gaudin, *supra* note 5, at 67.

²³*Id.* at 67. Societal problems, such as poverty, exacerbate this conflict. As a result, poor parents may be unable to provide a child with the necessities, but may not be neglecting a child.

In defining child neglect, agencies such as the National Center on Child Abuse and Neglect (NCCAN)²⁴ that focus on protective or civil laws use broad, yet recognizable symptoms and terms. They define child neglect in ways to increase public awareness; educate the public; and assist in prevention, identification, and treatment.²⁵

For example, an agency within the NCCAN--the National Resource Center on Child Abuse and Neglect²⁶--divides child neglect into four types: physical, educational, emotional, and medical. Physical neglect includes "the refusal of, or extreme delay in seeking necessary health care, child abandonment, inadequate supervision, rejection of a child leading to expulsion from the home, and failing to adequately provide for the child's safety, physical and emotional needs."²⁷ Educational neglect

²⁴See The Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 42 U.S.C. §§ 5105a-5106h & 10413 (1988) (re-authorizing NCCAN, which was originally established under The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, U.S.C. §§ 5101-5107 (1982)) The NCAAN is a division of the Administration on Children, Youth and Families, Administration for Children and Families, U.S. Department of Health and Human Services. The NCCAN is the federal agency tasked with assisting state and local activities and funds the National Resource Center on Child Abuse and Neglect. NAT'L RESOURCE CENTER ON CHILD ABUSE AND NEGLECT, BROCHURE (1994) [hereinafter RESOURCE CENTER BROCHURE].

²⁵RESOURCE CENTER BROCHURE, *supra* note 24. Specifically, the Resource Center concentrates on "information dissemination, knowledge building, training, technical assistance, best practices, and networking." *Id.*

²⁶See *supra* note 24 (explaining NCCAN and the Resource Center).

²⁷Information Sheet, Nat'l Resource Center on Child Abuse and Neglect, subject: Child Neglect (June 1994) [hereinafter Resource Center Child Neglect Information Sheet].

occurs "when a child is allowed to engage in chronic truancy, is of mandatory school age but not enrolled in school or receiving training, and/or is not receiving needed special educational training."²⁸ Emotional neglect includes "chronic or extreme spousal abuse in the child's presence, allowing a child to use drugs or alcohol, refusal or failure to provide needed psychological care, constant belittling and withholding of affection."²⁹ Medical neglect includes "the failure to provide for appropriate health care for a child--although financially able to do so," but does not include failure to obtain medical treatment based on religious beliefs.³⁰ Such descriptions create a visual picture and educate the public.

Because of different purposes, goals, and requirements, civil and criminal statutes, like the supporting agencies, use define child neglect and parental duties differently.³¹ Under civil child neglect statutes, definitions of child neglect determine when, and what type, of government intervention is warranted, and when reporting is required. Civil laws focus on initiating child protection, reporting, and terminating parental

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹For both civil and criminal statutes, most agree that children have the right to state protection from their parents' serious physical abuse, but "except for these obvious cases, it is difficult to know what parental behavior should trigger public investigation and intrusion." John E. Coons et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 318.

rights.³² In contrast, under criminal statutes, definitions determine when a parent's conduct triggers criminal liability. Civil laws address recurring parental failures or patterns,³³ while criminal statutes tend to include any egregious omissions in care that harm or endanger.³⁴ Additionally, civil statutes seek to protect children, while criminal codes seek to punish offenders who commit egregious deviations from acceptable standards of parental obligations.

Despite these differences and the overall difficulty in defining child neglect, states have responded to publicized national statistics and the victimization of children with both civil and criminal child neglect statutes.³⁵

B. How the Military Defines Child Neglect

The military does not currently have a definition of criminal child neglect. However, *DOD Directive No. 6400.1, Family Advocacy Program*,³⁶ defines child neglect and abuse in one broad category; the military, like the civilian sector,

³²The civil statutes, like the criminal statutes, vary from jurisdiction to jurisdiction and the grounds for neglect are inconsistent. McGovern, *supra* note 17.

³³Dubowitz, *supra* note 21, at 19.

³⁴*Id.* (discussing the varying grounds for child neglect in civil child protection laws).

³⁵See *infra* notes 204-208 and notes 325-364 and accompanying text (sections entitled, *National Incidence of Child Neglect and Comparison of State Criminal Child Neglect Statutes*).

³⁶DOD DIR. 6400.1, *supra* note 15, at encl. 2, para. 5.

classifies neglect and abuse as maltreatment. Maltreatment includes: "physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or combinations encompass[ing] both acts and omissions."³⁷

To maintain child abuse and neglect statistics, the DOD requires the individual services to submit reports; to clarify reporting requirements, the DOD has further explained the term "child neglect." In *DOD Directive 6400.2*,³⁸ the DOD defines the five types of maltreatment described in *DOD Directive 6400.1*. Neglect (deprivation of necessities) includes abandonment, and the failure to provide food, shelter, clothing, medical care, supervision, and education,³⁹ while emotional maltreatment

³⁷*Id.*

³⁸DEP'T OF DEFENSE, DIRECTIVE 6400.2, CHILD AND SPOUSE ABUSE REPORT, (July 10, 1987) [hereinafter DOD DIR. 6400.2].

³⁹According to the DOD

[n]ecessities deprivation specifically includes the following:

(1) *Neglecting to Provide Nourishment.* Failure to provide adequate or proper food, which results in a malnourished condition for the victim.

(2) *Neglecting to Provide Appropriate Shelter.* Failure to provide proper protection against the elements, sanitary living facilities, or a home excluding the victim from the home.

(3) *Neglecting to Provide Clothing.* Failure to provide the victim with adequate or proper clothing suitable for the weather, cleanliness, or custom and culture of the area.

(4) *Neglecting to Provide Health Care.* Failure to provide for proper medical or dental care that affects adversely or might affect adversely the physical, mental or psychological well-being of the victim.

includes emotional neglect.⁴⁰ The DOD uses these classifications for protective and rehabilitative measures, such as reporting, substantiating maltreatment, and determining treatment.⁴¹

(5) *Failure to Thrive*. A condition of a child indicated by not meeting developmental milestones for a typical child in the child's position; i.e. low height and weight or developmental retardation. The conditions are secondary to abuse or neglect.

(6) *Lack of Supervision*. Inattention on the part of, or absence of, the caretaker that results in injury to the child or that leaves the child unable to care for him or herself, or the omission to have the child's behavior monitored to avoid the possibility of injuring self or others.

(7) *Educational Neglect*. Allowing for extended or frequent absence from school, neglecting to enroll the child in school, or preventing the child from attending school for other than justified reasons (e.g., illness, inclement weather).

(8) *Abandonment*. The absence of a caretaker when the caretaker does not intend to return or is away from home for an extended period without arranging for a surrogate caretaker.

Id. at encl. 2, para. 13d.

⁴⁰The DOD defines emotional neglect as "[p]assive or passive-aggressive inattention to the victim's emotional needs, nurturing, or psychological well-being." *Id.* at encl. 2, para. 13e.

⁴¹Some of the individual services define neglect within their applicable regulations. For example, the army defines neglect as the following:

Neglect tends to be chronic in nature and involves inattention to the child's minimal needs for nurturance, food, clothing, shelter, medical care, dental care, safety or education. The possibility of neglect should be considered in cases where there has been an unexplained failure to thrive or where there has been an advanced untreated disease. Except as otherwise defined by applicable law, a finding of neglect is usually appropriate in any situation where a child, under the age of 9 is left unattended (or left attended by a child under the age of 12) for an inappropriate period of time. A finding of neglect is also appropriate when

Protective and rehabilitative measures require this more detailed definition of child neglect. Because *DOD Directive 6400.1* provides a general overview of the DOD Family Advocacy Program, only a general definition of maltreatment is required.

Consistent with the DOD definition, the discussion and analysis that follow rely on a definition of child neglect that includes emotional neglect, abandonment, and the failure to provide either food, shelter, clothing, medical care, supervision, or education.⁴² The term "maltreatment" will indicate both abuse and neglect. This thesis focuses on egregious child neglect in the areas of abandonment, endangerment, and deprivation, that rises to the level of criminal conduct.⁴³

a child, regardless of age, is left unattended under circumstances involving potential or actual risk to the child's health or safety. Dental neglect is defined as the failure by a parent to seek treatment for visually untreated dental caries, oral infections or pain, or failure by the parent to follow through with treatment once informed that any of the above conditions exist.

DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, para. 3-7e (18 Sept. 1987) [hereinafter AR 608-18]. However, the drafters of this regulatory provision did not design this definition as a criminal standard or punitive provision. The definition was included in the regulation as a uniform guideline for soldiers, commanders, and the family advocacy staff in determining whether a substantiated case of child neglect occurred. The drafters intended to limit subjective judgments while providing notice to the service. Telephone Interview with Colonel Alfred F. Arquilla, Chief of the Legal Assistance Division, Office of the Judge Advocate General (Mar. 27, 1995).

⁴²See *supra* notes 39 & 40 (identifying the DOD definitions).

⁴³This thesis does not discuss the standard for child neglect stated in civil protective statutes for civil actions, such as termination of parental rights and reporting neglect.

III. The Military Mirrors Society: A Delay in Interest and Intervention

Compared to child abuse, neglect is relatively difficult to identify and define. Although a common and harmful problem, until recently, the public and lawmakers have not recognized child neglect as a separate problem and have not considered it criminal conduct. Consequently, society and the military have slowly responded to the problem of child neglect, the most common form of child maltreatment.

A. *The Lack of National Attention to the Problem of Child Neglect*

Initially, state intervention to protect children from abuse and neglect developed from the work of the Society for the Prevention of Cruelty to Children--a private, benevolent, child protection society established in the late 1800s.⁴⁴ The society's work, an outgrowth of humane work for animals, included

For a clarification of criminal abandonment, endangerment, and deprivation, see *infra* notes 325-364 and accompanying text (section entitled *Comparison of State Criminal Child Neglect Statutes*).

⁴⁴Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1750 n.15 (1987). See also Walter Wadlington, *Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 2 U. ILL. L. REV. 311, 314 n.20. (1994).

vigorous lobbying for child protection laws and actively investigating and rescuing neglected children.⁴⁵

By the turn of the century, child protection laws began to emerge as state legislatures passed statutes authorizing the removal of children from "unwholesome, unsafe or neglectful environments."⁴⁶ Problems such as infanticide, abandonment, and physical abuse prompted initial legislation.⁴⁷ Society primarily focused on child abuse because of the obvious injuries parents caused.

Laws involving juveniles further developed in the twentieth century, but until 1950, criminal child neglect was not part of their focus.⁴⁸ Society essentially disregarded child abuse and neglect until the 1960s when Dr. C. Henry Kempe published his research on the battered child syndrome;⁴⁹ this prompted states to begin enacting child abuse reporting laws.⁵⁰ As child abuse became a recognized problem, the public, media, and legislatures

⁴⁵Garrison, *supra* note 44, at 1750 n.15.

⁴⁶John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?* 24 U. LOUISVILLE J. FAM. L. 149, 160 (1985-86) (footnote omitted).

⁴⁷*See Id.*

⁴⁸Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding: In Re B.B.*, 76 IOWA L. REV. 167, 170 (1990).

⁴⁹C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

⁵⁰Marcia A. Kincanon, Note, *The Child Abuse that Doesn't Count: General and Emotional Neglect*, 22 U. CAL. DAVIS L. REV. 1039, 1046-1047 (1989).

began addressing child maltreatment in general. Child neglect, almost as an afterthought, gradually gained attention as well.⁵¹

B. The Military's Delayed Response

While states were establishing child abuse reporting laws in the 1960s, the military failed to identify and address the problem of child maltreatment. Today, the military is responding to the problem of child abuse, but neglect is seemingly treated as an afterthought. Historically, the military was without a central reporting and tracking agency equivalent to state child welfare agencies.⁵² Due to its diverse and widespread locations, the military could not as easily assess the problems of child abuse and neglect.⁵³ The military maintained a "fragmented perspective," viewing child abuse as only isolated cases, instead of a military-wide problem.⁵⁴

By the 1970s, the services had recognized child maltreatment as a problem, and in 1975 and 1976 the separate military services formed individual service child advocacy programs.⁵⁵ Finally, in 1981, responding to a Government Accounting Office (GAO)

⁵¹Wolock, *supra* note 18, at 535.

⁵²Musetta Tia Johnson, *Unique Problems in Prosecuting Child Abuse Cases Overseas 4* (1991) (unpublished LL.M. thesis, The Judge Advocate General's School, United States Army).

⁵³See *id.*

⁵⁴Thomas J. Hasty III, *Military Child Advocacy Programs: Confronting Child Maltreatment in the Military Community*, 112 MIL. L. REV. 67, 73 (1986).

⁵⁵*Id.* at 74.

recommendation, the DOD formally responded to the problem of child maltreatment and established the DOD Family Advocacy Program.⁵⁶ At the DOD's direction, each service established its own family advocacy program.

Today, the individual service programs are responsible for prevention, identification, reporting, treatment, and intervention of child abuse and neglect and spouse abuse.⁵⁷ These programs remain the military's primary answer to child neglect. While the civilian sector has both civil child protection statutes and criminal statutes, the military relies primarily on the family advocacy programs.

IV. The Military's Neglect of Child Neglect

The military's response to child neglect, relying as it does on family advocacy programs, is an incomplete and ineffective response. Family advocacy programs provide rehabilitative and therapeutic options for commanders without punitive options. Although family advocacy programs allow punitive measures, aside from inconsistent or nonexistent state law, commanders have no available, adequate punitive measures. A lack of federal legislation exacerbates the problem. The armed forces overseas face even more extensive problems. Finally, inconsistent

⁵⁶See *id.*; Alfred F. Arquilla, *Crime in the Home*, ARMY LAW., Apr. 1988, at 3.

⁵⁷DOD Fact Sheet, *supra* note 16.

military caselaw seems to further limit the prosecution of criminal child neglect to the use of assimilated state law or punitive regulations.

The military's approach to the problem of child neglect is a combination of the family advocacy program case-by-case management and administrative sanctions. Because the goals of the commander may be extremely different from those of the family advocacy program, the family advocacy program frequently does not address the commander's needs. Punishment for criminal child neglect currently depends on the intervention of civil authorities and the existing state laws.

A. The Armed Forces' Approach to Solving Child Neglect: Family Advocacy Programs--The Military's Child Welfare Agencies?

Family advocacy programs are primarily concerned with preserving the best interests of the victim and the family. Program objectives include identification, diagnosis, treatment, education, counseling, therapy, and rehabilitation.⁵⁸ Like civil child protection agencies and civil child neglect statutes for reporting and termination of parental rights, family advocacy program's objectives are directed primarily at protecting the child and sanctity of the home. Different concerns require different responses. For example, the civil action of

⁵⁸*Id.*

involuntary terminating parental rights should not turn on a single incident regardless how heinous, but a criminal sanction is designed to punish single episodes repugnant to the community's concept of an orderly society.⁵⁹

By responding to criminal child neglect with treatment, these retraining, rehabilitative programs provide no notice to the service members or dependents as to acceptable, expected standards of parental responsibilities that create criminal liability. Program implementing regulations provide only guidelines. Family advocacy programs and committees provide minimal deterrence, have limited "control" over civilian dependents, cannot punish individuals, and without civilian authority or commander assistance, cannot remove parents or children from the home. Like society's civil statutes, the programs are directed towards protective actions and tend to focus on physical and sexual abuse due to the obvious injuries.

Family advocacy programs offer no criminal sanctions.⁶⁰ These programs merely provide commanders with recommended rehabilitative programs and use commanders to require service members to participate in rehabilitative actions. Commanders and prosecutors often want criminal sanctions as an alternative.

⁵⁹Commonwealth v. Skufca, 321 A.2d 889, 892 (Pa. 1974) (footnote omitted).

⁶⁰Family advocacy management teams may encourage civilian authorities or commanders to take punitive action. Commanders may take punitive action after the service member disobeys a lawful order.

Additionally, different goals, perspectives, and preferred solutions often cause disagreements between commanders or prosecutors and family advocacy staff.⁶¹ Many times social workers may view a child maltreatment incident as a manifestation of a dysfunctional family that needs treatment, while a lawyer may view the same incident as a criminal offense warranting prosecution and punishment.⁶²

1. *Department of Defense Guidance: What Are the "Uniform" Objectives for the Uniformed Services?*--The DOD directed the individual services to establish family advocacy programs, and gave the services two primary requirements: establish family advocacy case review committees and provide reports.⁶³ In its guidance, the DOD advocates coordination and cooperation with the civilian sector,⁶⁴ and then the DOD grants the services broad discretion in program implementation, based on individual resources and requirements.⁶⁵

The case review committees have limited power and cannot punish soldiers or civilians. Family advocacy case management committees can indirectly cause a service member to participate in treatment (through a commander's order), but they have limited control over a civilian family member. Therefore, a civilian's

⁶¹See Arquilla, *supra* note 56, at 3.

⁶²*Id.*

⁶³DOD DIR. 6400.1, *supra* note 15, para. E2.

⁶⁴*Id.*

⁶⁵Hasty, *supra* note 54, at 76.

participation in rehabilitation is voluntary. The DOD requires that the committees give commanders access to complete case information.⁶⁶ Prior to determining the appropriate disposition of any maltreatment incidents, commanders *must* consider specific factors.⁶⁷

2. Individual Service Programs-Policies and Objectives--

Each military service has established a family advocacy program and promulgated a regulation that implements the program.⁶⁸ Overall, the military services agree that child neglect adversely impacts service member and unit readiness, morale, and discipline; and disciplinary or administrative action is warranted in some cases. All services allow disciplinary and

⁶⁶DOD DIR. 6400.1, *supra* note 15, at para. F3.

⁶⁷*Id.* para. F3a. Specifically,

[f]actors that shall be considered in determining dispositions include the following:

- a. Military performance and potential for further useful service.
- b. Prognosis for treatment as determined by a clinician with expertise in the diagnosis and management of the abuse at issue (child abuse, child neglect, child sexual abuse, and/or spouse abuse).
- c. Extent to which the alleged offender accepts responsibility for his or her behavior and expresses a genuine desire for treatment.
- d. Other factors considered to be appropriate by the command.

Id.

⁶⁸DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY (22 July 1994) [hereinafter AFI 40-301]; AR 608-18, *supra* note 42; Marine Corps Order 1752.3A, Marine Corps Family Advocacy Program (6 Apr. 1987) [hereinafter MCO 1752.3A]; and Dep't of Navy, Chief of Naval Operations Instruction No. 1752.2, Family Advocacy Program (6 Mar. 1987) [hereinafter OPNAVINST 1752.2].

administrative sanctions because "[s]ervice members must be held accountable for their behavior. Swift and certain intervention and subsequent disciplinary action are one of the most effective deterrents."⁶⁹

All service programs use a committee case management tracking method. Interdisciplinary teams (case review committees) meet and determine whether a case is substantiated.⁷⁰ If a case is substantiated, the committee recommends "specific treatment strategies and program intervention to be offered to the family and individuals involved."⁷¹ The team also recommends rehabilitative and treatment responses to the commander.⁷² The committee cannot remove a child from the home and must rely on civilian child protection agencies or commanders for such action.⁷³ Nonetheless, family advocacy programs do not preclude additional criminal sanctions and disciplinary or adverse administrative action.⁷⁴

⁶⁹OPNAVINST 1752.2, *supra* note 68, para. 3b.

⁷⁰DOD DIR. 6400.1, *supra* note 15, para. F2.

⁷¹Willard W. Mollerstrom et al., *Family Violence in the Air Force: A Look at Offenders and the Role of the Family Advocacy Program*, 157 MIL. MED. 371, 372 (1992).

⁷²DOD DIR. 6400.1, *supra* note 15, para. F2.

⁷³AR 608-18, *supra* note 41, para. 3-28.

⁷⁴Within applicable regulations, each individual service presents its policies; and some services identify factors that commanders should consider in determining whether disciplinary or administrative sanctions are appropriate. See AFI 40-301, *supra* note 68, at ch. 4 (discussing disposition of personnel, without providing specific considerations); AR 608-18, *supra* note 42, at para. 4-2 (providing policy), para. 4-4 (presenting commander's considerations); MCO 1752.3A, *supra* note 68, para. 4 (discussing policy), para. 4f. (providing commander's considerations);

B. A Federal Legislative Void Adversely Affects the Military's Response

No matter what action family advocacy committees, commanders, or prosecutors decide to take in child neglect cases, because there are no federal criminal statutes specifically prohibiting child neglect, military services must rely on state statutes. This reliance may produce inconsistent results and disparate treatment. The military's organizational constraints and goals militate against ad hoc disposition of offenses and highlight the need for a uniform standard of parental responsibilities. The problem with the military's reliance on state statutes is exacerbated when the military cannot fall back on civil child neglect statutes in areas of exclusive federal legislative jurisdiction or abroad.

1. *Federal Child Neglect Legislation*--State and local child protection services traditionally have had the primary responsibility of responding to child abuse and neglect.⁷⁵ Since 1935, with the enactment of the Social Security Act, the federal programs have been directed toward stimulating child welfare services and aid to families.⁷⁶ In 1974, the Child Abuse

OPNAVINST 1752.2, *supra* note 68, para. 3 (discussing policy), para. 3b. (providing commander's considerations).

⁷⁵DIANE DEPANFILIS & MARSHA K. SALUS, NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: A BASIC MANUAL 19 (1992) [hereinafter BASIC MANUAL].

⁷⁶*Id.* at 18.

Prevention and Treatment Act⁷⁷ created the NCCAN to assist state efforts to implement programs and collect, analyze, and distribute information.⁷⁸ The NCCAN also provides grants and additional funds to states that meet federal guidelines and that initiate certain additional protective programs.⁷⁹

a. *The Absence of Federal Offenses*--However, federal criminal law does not provide for an offense of child maltreatment. Title 18 of the United States Code enumerates criminal statutes or general crimes, such as murder, arson, and assault.⁸⁰ The enumerated offenses generally reflect common law crimes; as a result, prosecutors cannot apply these statutes when

⁷⁷The Child Abuse Prevention and Treatment Act Pub. L. No. 93-247, 42 U.S.C. §§ 5101-5107 (1982).

⁷⁸BASIC MANUAL, *supra* note 75, at 18. The National Center on Child Abuse and Neglect was re-authorized in 1988 under Pub. L. No. 100-294, The Child Abuse Prevention, Adoption, and Family Services Act of 1988, 42 U.S.C. §§ 5105a-5106h & 10413. NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, CHILD ABUSE AND NEGLECT: A SHARED COMMUNITY CONCERN 12 (1992) [hereinafter A SHARED COMMUNITY CONCERN].

⁷⁹BASIC MANUAL, *supra* note 75, at 19. See also A SHARED COMMUNITY CONCERN, *supra* note 78, at 12 (1992). The federal government has enacted legislation that provides federal funds and assistance to states with community protection initiatives. The federal government encourages state civil child protection laws (such as reporting statutes) and assists child protection agencies.

⁸⁰Some of enumerated offenses are: Arson, 18 U.S.C.A. § 81 (West 1995); Assault, 18 U.S.C.A. § 113 (West 1995); Maiming, 18 U.S.C.A. § 114 (West 1995); Theft, 18 U.S.C.A. §§ 641, 661 (West 1995); Receiving Stolen Property, 18 U.S.C.A. § 662 (West 1995); Murder, 18 U.S.C.A. § 1111 (West 1995); Manslaughter, 18 U.S.C.A. § 1112 (West 1995); Attempted murder/manslaughter, 18 U.S.C.A. § 1113 (West 1995); Kidnapping, 18 U.S.C.A. § 1201; Destruction of property, 18 U.S.C.A. § 1363 (West 1995); Aggravated sexual abuse, 18 U.S.C.A. § 2241 (West 1995); Sexual Exploitation and Abuse of Children, 18 U.S.C.A. § 2258 (West 1995) Robbery, 18 U.S.C.A. § 2111 (West 1995).

a case involves only child neglect, unless the child dies and the offense falls under the federal homicide statute.⁸¹

With the Sexual Abuse Act of 1986,⁸² Congress provided some criminal sanctions for sexual abuse and exploitation of children.⁸³ Aside from that legislation, federal prosecutors must base child neglect charges on existing enumerated offenses. Therefore, the only effective criminal sanctions for child neglect remain in the state criminal codes. Consequently, despite the federal "government's good intentions, one major hole in the prosecution of child abuse remains, forcing federal prosecutors to apply poorly suited laws to federal cases."⁸⁴

b. *The Federal Assimilative Crimes Act*--For crimes occurring on military installations--such as criminal child neglect--military prosecutors may apply three categories of federal criminal law: "criminal laws enforceable only in areas of exclusive or concurrent jurisdiction" (Title 18 enumerated offenses and the assimilated state offenses);⁸⁵ criminal laws

⁸¹F. Chris Austin, Note, *Missing Tools in the Federal Prosecution of Child Abuse and Neglect*, 8 B.Y.U. J. PUB. L. 209, 226 (1993).

⁸²18 U.S.C.A. §§ 2241, 2243 (West 1995); 18 U.S.C.A. §§ 2251-2258 (West 1995).

⁸³Austin, *supra* note 81, at 210 (citing The Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241, 2243 (1988 & Supp III 1991)); 18 U.S.C.A. §§ 2251-2258 (West 1995) (creating a federal offense for sexual abuse of children).

⁸⁴*Id.*

⁸⁵DEP'T OF ARMY, PAMPHLET 27-21, ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 2-19c (15 Mar. 1992) [hereinafter DA PAM. 27-21]

enforceable in any place under federal control (acts made criminal under the Property Clause, such as trespass);⁸⁶ and "criminal laws enforceable regardless of where the offense is committed"⁸⁷ (unlimited application, even abroad, such as counterfeiting).

When charging criminal child neglect for on-post offenses, under the first category, prosecutors may charge only the enumerated offenses. Title 18 of the United States Code specifies that such offenses are crimes committed in the "special maritime and territorial jurisdiction of the United States."⁸⁸ This statutory language means that the offense must occur in areas of concurrent or exclusive federal jurisdiction.

Congress has not enacted a federal criminal child neglect and abuse statute applicable in the special maritime and territorial jurisdiction of the United States.⁸⁹ To fill possible gaps in federal criminal law, congress enacted the Federal Assimilative Crimes Act (ACA). The ACA allows federal prosecutors to adopt state criminal statutes (not local ordinances) as federal law for offenses occurring in areas of

⁸⁶*Id.* para. 2-15 (27-21); 18 U.S.C.A. § 1382 (West 1995).

⁸⁷*Id.* para. 2-19c. (DA PAM 27-21).

⁸⁸18 U.S.C.A. § 7(3) (West 1995).

⁸⁹However, in 1993 such legislation was introduced, see H.R. 3366, 103d Cong., 1st Sess. (1993). See also *infra* notes 403-411 and accompanying text (section entitled, *A Proposed Amendment to Title 18: The Child Neglect Act of 1996*).

concurrent and exclusive jurisdiction.⁹⁰ In essence, the ACA provides that whoever, in or on any lands reserved or acquired for the United States's use under exclusive or concurrent jurisdiction, is guilty of any act or omission which, although not punishable by any federal law, would be punishable under state law," shall be guilty of a like offense and subject to like punishment."⁹¹

To prosecute on-post offenses of child neglect, federal prosecutors can use the ACA to assimilate state laws.⁹² However, assimilation fails to provide consistency to service members and dependents because the state criminal child neglect statutes are inconsistent from state to state and nonexistent in some jurisdictions.⁹³

Aside from inconsistent and disparate treatment from station to station, another drawback is that ACA application causes procedural problems in trials involving child maltreatment. Specifically, when using the ACA, prosecutors may experience

⁹⁰United States v. Best, 573 F.2d 1095 (Cal. Ct. App. 1978); United States V. Holley, 444 F. Supp 1361 (D.C. Md 1977).

⁹¹18 U.S.C.A. § 13(a), 7 (West 1995).

⁹²Within the United States, state and local authorities may try civilian dependents for criminal child neglect occurring off post and on areas of concurrent jurisdiction, proprietary jurisdiction, and in areas of partial jurisdiction where the state has reserved criminal jurisdiction. See generally DA PAM 27-21, *supra* note 85.

⁹³See *infra* notes 325-364 and accompanying text (sections entitled, *Comparison of State Child Neglect Statutes*).

difficulty in charging the accused, proving the offense, and sentencing procedures.

Initially, federal prosecutors may find it difficult to determine appropriate charges. Because the ACA only assimilates the state criminal law where the installation is located, sometimes prosecutors may find distinguishing a state civil or regulatory statute from a criminal statute a complex endeavor.⁹⁴ Furthermore, charges involving mixed federal-state criminal statutes cause other problems. In cases involving different types of maltreatment, both federal and state law apply (as with children who are sexually abused and neglected); and simultaneous application of both laws increases complexity for prosecutors and jurors.⁹⁵ State law that conflicts with federal law or policy is prohibited from assimilation.⁹⁶ As a result, prosecutors may be unsure when deciding if a state statute may be assimilated.

Once the trial begins, increased proof requirements arise when prosecutors use the ACA. The prosecutor must provide proof of exclusive or concurrent legislative jurisdiction of the area

⁹⁴John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 13.

⁹⁵Austin, *supra* note 81, at 222.

⁹⁶Garver, *supra* note 94, at 18. The UCMJ does not preempt assimilation. See *United States v. Walker*, 552 F.2d 566 (Va. Ct. App. 1977) cert. denied, 434 U.S. 848. However, in trial by court-martial if the offense falls under a punitive UCMJ article then the government must charge the UCMJ punitive article and not the Assimilative Crimes Act. See MANUAL FOR COURTS-MARTIAL, United States, Part IV, para. 60c(5)(a)(1984) [hereinafter MCM].

where the crime occurred; prosecutors may find such proof difficult.⁹⁷ A military installation may have one, or any combination of the following types of jurisdiction: (1) exclusive federal legislative jurisdiction; (2) concurrent legislative jurisdiction; (3) partial legislative jurisdiction; and (4) proprietary interest.⁹⁸

Even after a conviction, prosecutors who use the ACA face problems establishing appropriate sentencing guidelines. After trial on the merits, the government must further assist the court in determining applicable sentencing (or punishment) to fulfill the ACA's "subject to a like punishment" requirement.⁹⁹ Determining whether a state's statutory civil sanctions or parole conditions are included as punishment may cause the court problems with sentencing.¹⁰⁰

c. Problems in Areas of Exclusive Federal Legislative Jurisdiction--The ACA allows the assimilation of state criminal child neglect statutes and only applies in areas of exclusive or concurrent jurisdiction. The ACA does not assimilate state civil child protection statutes. Absent a state criminal child neglect statute, many installations are forced to rely on state civil

⁹⁷Garver, *supra* note 94, at 14. As this author points out, in some cases this proof requirement is very difficult and must be established with evidence on the merits. *Id.*

⁹⁸RALPH BLANCHARD, NCCAN, PROTECTING CHILDREN IN MILITARY FAMILIES: A COOPERATIVE RESPONSE 15-16(1992)[hereinafter BLANCHARD, PROTECTING CHILDREN]. See also DA PAM 27-21, *supra* note 85, para. 2-5b.

⁹⁹Garver, *supra* note 94, at 19-20.

¹⁰⁰*Id.*

statutes. However, determining whether state civil child protection laws apply on the federal installation can be difficult. The type of jurisdiction on federal land determines what law (state or federal) applies on that property. Depending on what type of legislative jurisdiction exists on the installation, federal-state relationships differ from installation to installation.

In areas of concurrent legislative jurisdiction, both state and federal laws (civil and criminal) apply. Both sovereigns may exercise authority and, "to the extent that there is no interference with the federal function or military mission," state officials may enforce state laws in state courts.¹⁰¹ Because of the void in federal child maltreatment legislation, state laws apply in concurrent jurisdiction areas.

In partial jurisdiction areas, the state has reserved to itself some, but not all powers from the federal government. "Either the Federal Government, or the State or both, have some legislative authority but less than complete legislative authority."¹⁰²

In areas where the federal government has a lease or proprietary agreement with the state, and the federal government

¹⁰¹AR 608-18, *supra* note 41, at app. C-1b.

¹⁰²DA PAM. 27-21, *supra* note 85, para. 2-5b(3).

occupies but has no legislative jurisdiction (but some degree of ownership), only state civil and criminal laws apply.¹⁰³

However, when child maltreatment occurs in areas of exclusive federal legislative jurisdiction, the principal "question is whether state laws regarding child abuse can be applied."¹⁰⁴ Normally, state civil laws "have no operation or effect."¹⁰⁵

Areas of exclusive jurisdiction (and in some places partial jurisdiction) are considered enclaves.¹⁰⁶ "Federal-state relations respecting enclaves differ according to the issue involved and whether or not the enclave is viewed as part of the state in which it is located."¹⁰⁷ Two differing theories exist as to how an enclave is treated. Courts may consider the enclave a state within a state, where state law is inapplicable.¹⁰⁸ In contrast, courts may decide that because there is no "friction" with federal law then they will avoid the "fiction" of a state within a state.¹⁰⁹

¹⁰³*Id.* para. 2-5b(4).

¹⁰⁴Richard S. Estey, *State Jurisdiction in Child Abuse Cases*, *ARMY LAW.*, Feb. 1979, at 12.

¹⁰⁵*Id.* at 12.

¹⁰⁶DA PAM. 27-21, *supra* note 85, para. 2-8.

¹⁰⁷*Id.* para. 2-8. (27-21).

¹⁰⁸*See Collins v. Yosemite Park & Cherry Co.*, 304 U.S. 518 (1938).

¹⁰⁹*See generally* DA PAM. 27-21, *supra* note 85; Interview with Major Steve Castlen, Instructor, Administrative & Civil Law Division, The Judge Advocate General's School, Army, in Charlottesville, Va. (Feb. 24, 1995). (Major Castlen believes that the federal government could resolve this problem if it

In any case, because of this legal debate, civilian child protection agencies, local law enforcement, and civil courts that issue restraining orders are unsure whether: (1) they may order or remove a child or parent from the home; (2) they have authority to order or conduct home inspections; and (3) they will face civil personal liability (especially police officers) for taking such actions in areas of exclusive jurisdiction.¹¹⁰ Local agencies may be reluctant or even decline to investigate or take any of these actions. Because they are short on resources, civilian authorities may decide that the risks outweigh the benefits of these actions. As a result, some advocates call for a congressional "domestic violence exception" from "exclusive legislative jurisdiction of federal enclaves so that all enclave domestic violence victims are assured legal recourse."¹¹¹

retroceded these areas of exclusive jurisdiction back to the states). See *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953).

¹¹⁰DA PAM. 27-21, *supra* note 85, para. 2-10d. (27-21). See also *In re Terry Y.*, 161 Cal. Rptr. 452 (Cal. Ct. App. 1980) (in removal of battered child on a federal enclave, court held that federal policy on child protection indicated that states would make services available to children on the federal installation); *Board of Chosen Freeholders v. McCorkle*, 237 A.2d 640 (N.J. Super. Ct. App. Div. 1968) (holding that state child welfare programs applied to children on the installation); *Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989) (holding state court's authority to issue a restraining order enforceable on Fort Devens when the abuse victim was a service member who resided on the federal enclave).

¹¹¹Michael J. Malinowski, Note, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 191 (1990).

To resolve difficulties, the DOD encourages cooperation with local civilian authorities and establishment of Memoranda of Agreement between military installations and civilian authorities.¹¹² In the alternative, the federal government can provide legislation in the area of child abuse and neglect and resolve these civil legal issues.

2. *Difficulties Overseas*--For child neglect incidents abroad, prosecutors, commanders, and family advocacy committees cannot fall back on state civil or criminal statutes for resolution. Moreover, prosecuting civilian dependents for criminal child neglect committed abroad is even more challenging than proceeding against such misconduct in the United States. With approximately nineteen percent of the total active duty military personnel assigned outside the United States and its territories,¹¹³ the lack of criminal jurisdiction over civilians accompanying the force creates problems.

a. *Cultural Differences Cause Difficulties*--While assigned overseas, service members and their dependents experience magnified stressors of military life.¹¹⁴

¹¹²See DOD DIR. 6400.1, *supra* note 15, para. E2h.

¹¹³MILITARY FAMILY CLEARINGHOUSE, OFFICE OF THE UNDER SECRETARY OF DEFENSE, MILITARY FAMILY DEMOGRAPHICS: PROFILE OF THE MILITARY FAMILY 8 (1994) [hereinafter MILITARY DEMOGRAPHICS].

¹¹⁴Ronald E. Prier & Myra I. Gulley, *A Comparison of Rates of Child Abuse in U.S. Army Families Stationed in Europe and in the United States*, 152 MIL. MED. 437, 439 (1987). See *infra* notes 209-224 and accompanying text (section entitled *Incidence of Child Neglect in the Military Community*).

Assignments in foreign countries require added adjustments and cause stress due to language barriers, lack of on-post housing, and distance from home.¹¹⁵ As a result, in military communities abroad, child neglect is common. As indicated in Figure 3, in 1992, the armed forces assigned outside the continental United States (OCONUS) reported 683 substantiated child neglect cases (including medical neglect) and 218 substantiated emotional maltreatment.¹¹⁶

b. *Civilian Offenders: Crime Without Punishment Under United States Law*--Military or federal criminal jurisdiction over civilian offenders abroad poses difficulty no matter what the offense. Status of Forces Agreements (SOFA) usually give the United States primary jurisdiction over civilians,¹¹⁷ but because most federal criminal law does not apply in foreign nations, the United States lacks the ability to prosecute.¹¹⁸

¹¹⁵Prier, *supra* note 114, at 439.

¹¹⁶NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, CHILD MALTREATMENT 1992: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 42 (1994) [hereinafter CHILD MALTREATMENT 1992]. Cultural differences and the presence of non-command sponsored dependents overseas may cause a decrease in reports of child neglect; therefore, these statistics may be understated. See *infra* notes 192-198 and accompanying text (section entitled *Empirical Data: Problems Identified Through an Army Survey*).

¹¹⁷See Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994).

¹¹⁸James K. Lovejoy, *USAREUR Regulation 27-9, "Misconduct by Civilians," ARMY LAW.*, June 1990, at 16 n.4. Most scholars contend that "special maritime and territorial jurisdiction of the United States" does not extend federal court jurisdiction to foreign countries. (See Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment-Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. L.Rev. 184 (1971); DA PAM 27-21, *supra* note

Even if federal law did apply overseas, only the enumerated offenses and federal offenses explicitly extraterritorial would apply. (As cited earlier, the enumerated offenses of Title 18 do not include child neglect unless the child suffered physical harm and the offense fell under a traditional crime listed.) As many scholars have noted, except for explicitly "extraterritorial jurisdiction" federal statutes, federal law does not apply to offenses occurring abroad.¹¹⁹ As a general rule, host nations have obtained de facto exclusive jurisdiction over civilians accompanying the military forces overseas.¹²⁰ Although SOFAs give the United States primary concurrent jurisdiction for crimes committed against dependents,¹²¹ and the UCMJ grants court-martial jurisdiction over civilians accompanying the force,¹²² the United

85, para. 2-19c. But See *United States v. Erdos*, 474 F.2d 157 (4th Cir.), cert denied, 414 U.S. 876 (1973) (holding that "special maritime and territorial jurisdiction" under Title 18 United States Code, for federal crimes extended to United States embassy property that the United States leased, and further holding United States district court had jurisdiction to try American citizen who committed murder on United States embassy property abroad).

¹¹⁹See Lovejoy, *supra* note 118, at 17 n.4. (USAREUR); generally, Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas- Still With US*, 117 MIL. L. REV. 153 (1987).

¹²⁰Lepper, *supra* note 117, at 172.

¹²¹See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67, art. VII, para. 3. The United States has similar agreements with other receiving nations, such as the Republic of Korea. Those agreements have similar provisions.

¹²²UCMJ art. 2(a)(11) (1984); See also MCM, *supra* note 96, R.C.M. 202 discussion.

States Supreme Court has declared military jurisdiction over civilians during peacetime unconstitutional.¹²³

In cases where the United States has primary concurrent jurisdiction, commanders may have the first option to take action against the civilian offenders. In many child neglect or abuse cases, commanders must choose between imposing adverse administrative action against the offender or turning the offender over to local authorities for criminal prosecution.¹²⁴

Relinquishing jurisdiction to local authorities requires the military to notify the local authorities; while military action requires commanders to have existing punitive regulations.¹²⁵ The only adverse actions against civilians that commanders may use are the limited administrative remedies, such as withdrawal of exchange and commissary privileges, removal from government housing, and involuntary return to the United States.¹²⁶ However,

¹²³See *Reid v. Covert*, 354 U.S. 1 (1957) (holding United States could not court-martial civilian dependents of service members for offenses while abroad); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (court-martial of civilian dependent for non-capital offense held unconstitutional); *Grisham v. Hagan*, 361 U.S. 278 (1960) (court-martial of Department of Army civilian for capital offense held unconstitutional); *United States v. Averette*, 19 C.M.A. 363, 41 C.M.R. 363 (1970) (holding that "time of war" jurisdiction over civilians only applies during a congressionally declared war).

¹²⁴*Lepper*, *supra* note 117, at 180.

¹²⁵*Id.*

¹²⁶*McClelland*, *supra* note 119, at 174. In supporting the contention that administrative sanctions are inadequate, the author cites Comptroller General of the United States, Report to the Congress: Some Criminal Offenses Committed Overseas by DOD

by withdrawing access to necessities, administrative sanctions may cause more criminal neglect to occur in the offender's home.

In many areas of the world, cultural differences and different standards for parental responsibilities and child care create added difficulty when relying on host nations to prosecute defendants.¹²⁷ Host nations may not have criminal child neglect statutes. Cultural differences also may inhibit host nations from taking action against civilian offenders.

When host nations do not exercise jurisdiction, the United States still might try civilians for crimes committed abroad, if federal statutes existed that granted extraterritorial jurisdiction over offenses.¹²⁸ However, there are none.

C. Prosecuting Army Service Members for Child Neglect Under the UCMJ: No Injury--No Charge

Unlike civilian offenders, the military may charge service members for crimes committed anywhere. Although the government may try a soldier in *federal court* for offenses committed on the installation, prosecutors would face the same difficulties previously discussed when trying service members in federal court. However, a soldier is subject to court-martial

Civilians Are Not Being Prosecuted: Legislation Is Needed, 96th Cong., 1st Sess. (1979) [hereinafter GAO Report].

¹²⁷See generally Johnson, *supra* note 52.

¹²⁸McClelland, *supra* note 119, at 174.

jurisdiction for crimes against a military family member.¹²⁹ Under clause 3 of Article 134, UCMJ, the government also may charge service members in a court-martial for violations of federal law, including assimilated state law.¹³⁰

The UCMJ purportedly "regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians."¹³¹ However, based on recent caselaw, charging child neglect under the UCMJ may be difficult, and requires some evidence of physical harm to the child, a violation of a punitive regulatory provision, or a violation of state law.

1. *Entering the "Morass" of Child Neglect, Absent a Statute or Punitive Regulatory Provision*--Few military court opinions have addressed the topic of child neglect. Recently, however, both the ACCA and the United States Air Force Court of Criminal Appeals (AFCCA) have specifically addressed the potential charge of child neglect under the UCMJ and rendered opposing opinions. Both cases involved child neglect offenses and in both cases the government charged the accused with a violation of Article 134.

¹²⁹DA PAM. 27-21, *supra* note 85, para. 2-19c (citing Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes, signed by the Attorney General and Secretary of Defense on 14 Aug. and 22 Aug 1984, respectively).

¹³⁰For a more thorough explanation of Article 134, UCMJ, see Criminal Law Div. Note, *Mixing Theories Under the General Article*, Army Law., May 1990, at 66.

¹³¹*Parker v. Levy*, 417 U.S. 748, 750 (1974).

Article 134 provides for the prosecution of "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."¹³² In both the army and air force cases, the accused was charged with a violation of clause 2, Article 134, service discrediting conduct.

In 1991, in *United States v. Wallace*,¹³³ the army court reviewed a "home alone" case, where the accused locked his three children (whose ages were approximately seven, six, and one) unattended in government quarters from 2000 to 0230. The accused's wife, also a service member, called home while away on temporary duty (TDY) and discovered the children unsupervised. She called the Charge of Quarters and had him send a neighbor, SGT M, to pick up the children. At about 2215, SGT M went to the house. The six-year-old girl was crying, distraught, and unable to unlock the door with the keys for fifteen minutes.

The issue in the case was whether the accused's conduct brought discredit on the service. At trial, the military judge found the accused guilty of service discrediting conduct for the following reasons:

¹³²UCMJ art. 134 (1984).

¹³³33 M.J. 561 (A.C.M.R. 1991).

the relative ages of the children; the length of time the children were unattended; the length of time the Accused was absent from his quarters; again, that was until 0230; the failure of the Accused to adequately train his two older children on how to unlock the door in case of an emergency; the distance that he went away from the children; the complete absence of the mother; and failure to notify anyone that he was leaving the children unattended.¹³⁴

On appeal the ACCA stated that "[a]bsent a statute or a punitive regulatory provision" it refused to enter the "morass . . . by holding that child neglect standing alone, constitutes an offense under Article 134, UCMJ."¹³⁵ Furthermore, the court pointed out that for cases involving conduct resulting in injury to a child, prosecutors may charge existing punitive articles.¹³⁶

¹³⁴Record of Trial (summarized), United States v. Wallace, Thomas E., 1 Nov. 1989, at 39. [hereinafter R.T.] 33 M.J. 561 (A.C.M.R. 1991)

¹³⁵Wallace, 33 M.J. at 564.

¹³⁶Id.

The Accused was found guilty by exceptions and substitutions of the following: [Appellant] did, at Robinson Barracks, Federal Republic of Germany, on 16 July 1989, violate his duties of care to his then seven-year old step-son, Richard, his about six-year old daughter Jennifer, and his one-year old son Thomas, by locking the children in government quarters at 2000 hours without training them how to unlock the door in case of an emergency and without providing any responsible care for those children for approximately two and one-half hours.

Id. at 562 n.1.

The ACCA focused on three reasons for its decision. First, the children did not suffer any apparent harm. Secondly, although no universal child neglect standard exists, most state child neglect offenses are directed at neglect to support and defining an offense would be difficult. Most importantly, the court noted that the accused did not have notice that his conduct was a criminal offense, a constitutional prerequisite to prosecution.¹³⁷ The court stated that "[n]o person can be held criminally responsible for conduct which he could not reasonably understand to be prohibited" and furthermore, the court doubted that the accused "was on notice that his conduct was a criminal offense."¹³⁸

The ACCA *did not* focus on the *potential* harm to the children or the fact that SGT M, (with a master's degree in counseling and who had worked with abuse cases) said two of the children were crying, whimpering, upset, and needed to be consoled, held, and calmed down.¹³⁹ The ACCA failed to recognize the possibility of latent injury, even though latent injury was possible since the parents frequently left the children home alone.¹⁴⁰ The decision

¹³⁷*Id.* at 563-564.

¹³⁸*Id.* at 563-564 (citations omitted).

¹³⁹R.T., *supra* note 136, at 22.

¹⁴⁰Wallace, 33 M.J. at 562-563 (accused told police, he and his wife let the oldest child watch the children for short periods of time). *Id.*

also fails to mention the unavailability of the Assimilative Crimes Act because the offense occurred in Germany.

Absent obvious physical harm to the child, the ACCA has effectively limited army prosecutors to administrative sanctions.¹⁴¹ Specifically, the ACCA reasoned that "conduct which results in injury to children can be charged under existing punitive provisions of the Uniform Code of Military Justice. Otherwise, incidents of child neglect should be processed administratively under the Army Family Advocacy Program."¹⁴² The ACCA essentially disregarded potential danger or injury to the child, and the not-so-obvious injury inherent in child neglect. Although the UCMJ provides a more severe punishment for completed crimes, it provides punishment for crimes such as attempted offenses, with or without discernible injury.¹⁴³

¹⁴¹See DAD note, *No Harm-No Foul: Absent Actual Injury, Army Court Finds No Criminal Offense in Child Neglect*, ARMY LAW., Oct. 1991, at 32.

¹⁴²Wallace, 33 M.J. at 564 (footnote omitted).

¹⁴³See generally SANDFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESS- CASES AND MATERIALS (4th ed. 1983) ("[I]t is possible to attempt a crime of negligence. . . . one that can be committed negligently; but some crimes of this class are sometimes committed intentionally or recklessly. There is no reason why a person should not be convicted of attempting to commit an intentional violation of a law prohibiting negligence. Suppose that D, knowing that his car has no brakes, attempts to start it in order to drive it; he is stopped by a policeman. He has, in fact, intentionally attempted to do an act that when done would be negligent and dangerous. There is no logical reason why he should not be convicted of attempt to drive dangerously." *Id.* at 567, quoting, G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 619-62 (2d ed. 1961); See also generally WAYNE R. LAFAYE & AUSTIN W. SCOTT JR., CRIMINAL LAW (2d. ed. 1986). But see, *United States v. Roa*, 12 M.J. 210, 213 (C.M.A. 1982) (holding that there are no such

In *United States v. Valdez*,¹⁴⁴ a 1992 ACCA decision, the court followed the *Wallace* decision, and dismissed another child neglect specification charged under both clauses 1 and 2 of Article 134.¹⁴⁵ Like *Wallace*, the offense in *Valdez* also occurred in Germany.

In *Valdez*, the accused's eight-year-old daughter, Michelle, had numerous bruises, abrasions, and suffered from battered child

offenses as attempted negligent homicide or attempted manslaughter by culpable negligence.).

¹⁴⁴*United States v. Valdez*, 35 M.J. 555, (A.C.M.R. 1992), *aff'd*, 40 M.J. 491 (C.M.A. 1994).

¹⁴⁵The child neglect specification stated the following:

In that Staff Sergeant Ricardo Valdez, US Army, did, at West Berlin and Mainz-Finthen, Federal Republic of Germany, between on or about 14 November 1986 and 28 March 1990, by intentional design, wrongfully fail to properly care for Michelle Valdez, his child who was five to eight years old during this period, by failing to enroll her in the appropriate level of school or provide similar instruction at home, and by failing to ensure that she was properly immunized as medically prudent and by failing to seek medical or psychiatric treatment of [sic] counseling for his daughter's medical and/or psychiatric problems, which included injuries which he knew had been inflicted upon her, and from which she was in pain and suffering, and urination and defecation incontinence, and by failing to provide proper nutrition and a healthy living environment for her, such intentional neglect under the circumstances being to the prejudice of good order and discipline in the armed forces, and/or after her death from said neglect became known to persons outside the military community, said death and neglect and news of the same being reasonably foreseeable, also being of a nature to bring discredit upon the armed forces.

Id. at 558.

syndrome; was underweight and underdeveloped; and suffered from malnutrition.¹⁴⁶ The accused and his wife forced the victim to sleep uncovered on a mat on the bathroom floor. The entire family (father, step-mother, and two older step-daughters) physically abused Michelle. The evidence also showed that the victim never was enrolled in school. Michelle eventually died from septicemia and staphylococcal pneumonia. Staff Sergeant Valdez, the accused, had been investigated for child abuse several years earlier at Fort Benning, Georgia, and feared a new accusation of abuse and, therefore, was reluctant to bring Michelle to the hospital.¹⁴⁷

Because the child victim in *Valdez* died, the central issue of the case was not the child neglect "failure to provide proper care" specification. The court focused on the remaining charges of unpremeditated murder, maiming, and larceny of military property. As part of their decision, the ACCA merely followed *Wallace* and dismissed the child neglect specification. The ACCA then upheld the accused's conviction for unpremeditated murder for child abuse, withholding medical attention, and failure to provide adequate nutrition; and maiming for kicking the victim and failing to provide medical care. When the CAAF reviewed the case, it merely noted, in a footnote, that the lower court had dismissed the specification and the basis for dismissal.

¹⁴⁶*United States v. Valdez*, 40 M.J. 491, 492 (C.M.A. 1994). The accused brought the victim into the hospital eight hours after death and rigor mortis had set in. *Id.* at 493.

¹⁴⁷*Valdez*, 35 M.J. at 559.

Although the ACCA has chosen to limit alternatives for charging child neglect, the AFCCA has taken a different stance. In the 1990 unreported opinion of *United States v. Foreman*,¹⁴⁸ the AFCCA held that the offense of child neglect "is viable under clause 2 of Article 134."¹⁴⁹

Foreman involved an accused who pleaded guilty to wrongful use of cocaine and criminal child neglect. Staff Sergeant Foreman, the accused, resided with a newborn daughter, and two sons ages three and two in government quarters. In violation of Article 134 service discrediting conduct, she was charged with (1) using cocaine the month prior to her child's birth; (2) failing to bathe and to change the diaper of her newborn with sufficient frequency, causing severe diaper rash and a scalp condition, and (3) failing to clean government quarters to such a degree that her children's health was endangered.¹⁵⁰

The AFCCA reviewed the three acts of misconduct and, while finding that the evidence on the record did not support the accused's guilty plea, held that a charge of criminal child neglect as service discrediting conduct was viable. However, the

¹⁴⁸*United States v. Foreman*, ACM 28008 (A.F.C.M.R. 25 May 1990).

¹⁴⁹*Id.* at 2.

¹⁵⁰*Id.* (upholding the accused's conviction for using cocaine, but finding that the stipulation of fact and admissions during the providence inquiry did not sustain the conviction for child neglect. The Court refused to find the accused guilty of child neglect to an unborn fetus.)

AFCCA held that an unborn fetus could not be a victim of criminal neglect.

Although the Army and Air Force cases involved different types of child neglect,¹⁵¹ the CAAF has not settled this apparent disagreement between the services. Consequently, the military services are proceeding under inconsistent court guidance.

2. *Applying the Punitive Articles "As Is"*--Prior to *Wallace*, one reasonably could have believed that the government could prosecute child neglect under the punitive UCMJ articles without a requirement of physical injury.¹⁵² In such cases, limited charging options still are available.

For example, Article 92, UCMJ, Failure to Obey a Lawful Order or Regulation, provides alternatives. If a service member violates a punitive regulation, trial counsel may charge an Article 92 violation. Commanders also may give lawful orders or inform a service member of the duty to clean government quarters. Once the duty is not fulfilled, trial counsel may charge the service member with failure to obey a lawful order¹⁵³ and dereliction of duty,¹⁵⁴ respectively. However, these potential charges require repeated failures and give service members other

¹⁵¹ACCA reviewed a "home alone," abandonment offense and the AFCCA reviewed a deprivation offense.

¹⁵²Adrian J. Gravelle, *Prosecution of Child Abusers*, Vol. III, No. 7 Trial Counsel Forum, July 1984, at 2.

¹⁵³UCMJ art. 90, 91 (1984).

¹⁵⁴*Id.* art. 92.

opportunities to injure children. Lawful order violations do not provide a charge for the first and potentially egregious offense (i.e., abandonment).

In appropriate officer cases, prosecuting child neglect under Article 133, UCMJ, Conduct Unbecoming an Officer and Gentleman, remains a possibility.¹⁵⁵ Although military courts have not specifically decided any abandonment, endangerment, or deprivation cases under Article 133, courts have upheld an officer conviction for Article 133 violations for failure to report a spouse for abusing the children and failure to seek treatment for a child.¹⁵⁶

Since the late 1800s, the military services have held officers criminally liable for abuse and neglect of dependents based on the expectation of "a more highly developed sense of moral and civil responsibilities."¹⁵⁷ An officer has an essential, required duty "to protect and look after the welfare not only of his troops but also the members of his family"; and is accountable for acts and conduct involving cruelty, neglect, and indifference toward injured family members.¹⁵⁸ Consequently, in officer cases, the courts in all likelihood will uphold child neglect offenses charged under Article 133.

¹⁵⁵See *United States v. Miller*, 37 M.J. 133 (C.M.A. 1993).

¹⁵⁶See *id.*

¹⁵⁷Arthur A. Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97, 107 (1964).

¹⁵⁸*Miller*, 37 M.J. at 138-139 (Sullivan, C.J. concurring).

Under Article 134, based on *Wallace*, Army trial counsel appear limited to charging child neglect under clause 3, assimilating state offenses. At least in the Army, absent a state statute, charges for child neglect under clauses 1 and 2, disorders or neglects to the prejudice of good order and discipline, may not stand.¹⁵⁹ Charging child neglect under clause 3 using the Assimilative Crimes Act may result in the same difficulties, inconsistencies, and complexities, as charging civilian offenders.¹⁶⁰

¹⁵⁹In *Wallace*, the Court did not limit its decision to only clause 2. By stating "constitutes an offense under Article 134, UCMJ," the court said a charge under clause 1, prejudicial to good order and discipline, also could not stand. *United States v. Wallace*, 33 M.J. 561, 564 (A.C.M.R. 1991). The court clearly held that the government could not charge child neglect under either clause 1 or 2 of Article 134 when they dismissed the specification in *United States v. Valdez*, 35 M.J. 555 (A.C.M.R. 1992); See also *infra* notes 192-198 and accompanying text (section entitled *Empirical Data: Problems Identified Through an Army Survey*, discussing problems in the field based on the court's generalization).

¹⁶⁰See DAD note, *The Pitfalls of Charging Offenses Under the Assimilative Crimes Act*, ARMY LAW., Sept. 1992, at 23 (describing the extensive procedural problems with charging conduct under clause 3, Article 134 including: that the government must prove, on the record, that the state ceded jurisdiction and the United States accepted, and existence of federal legislative jurisdiction over the geographical location of the situs of the offense; and that the existence of any punitive applicable UCMJ preempts use of the assimilated state statute.) *Id.* See also *United States v. Irvin*, 13 M.J. 749 (A.F.C.M.R. 1982) (illustrating the procedural difficulties when trying child abuse cases under the clause 3 of Article 134, and Assimilative Crimes Act).

3. *A Trend in Prosecution of Parental Omissions*--Although the CAAF never has directly addressed the possibility of a criminal charge for child neglect against enlisted service members, it has upheld convictions for parental omissions resulting in death or injury. Military courts consistently have held that even enlisted service members, as parents, are responsible for some parental failures; specifically, parental failures resulting in a child's death.

Military courts usually uphold convictions for such failures as involuntary manslaughter¹⁶¹ (requiring culpable negligence) or the lesser-included offense of negligent homicide¹⁶² (requiring simple negligence). In these cases, military courts have recognized that a parent: "owes a legal duty to provide medical care to a minor unemancipated child in the parent's custody"¹⁶³; can be criminally liable for negligently leaving a child with a known abusive caretaker;¹⁶⁴ is responsible for a child's welfare and safety, especially when the child is very young;¹⁶⁵ and may be

¹⁶¹UCMJ, art. 119 (1984).

¹⁶²*Id.* art. 134.

¹⁶³*United States v. Robertson*, 33 M.J. 832, 835 (A.C.M.R. 1991) (charged with an Article 119 violation, ACCA found accused guilty of Article 134, negligent homicide for failing to get the necessary medical care for son who had anorexia).

¹⁶⁴*United States v. Perez*, 15 M.J. 585 (A.F.C.M.R. 1983) (upholding a conviction for negligent homicide for negligently leaving a five month old son with a boyfriend who on two previous dates had inflicted serious bodily injury on the child); See also *United States v. McGhee*, 33 M.J. 763, 765 (A.C.M.R. 1991) (accused convicted of negligent homicide for negligently leaving the child with someone who was likely to inflict grievous bodily harm resulting in death).

¹⁶⁵*Perez*, 15 M.J. at 587.

held criminally liable for "failing to provide the necessities of life."¹⁶⁶

Additionally, while the ACCA requires intent to harm as a prerequisite to charging child neglect, the UCMJ includes many offenses that may be committed through negligence or recklessness. The military may charge an accused with the following: missing movement through *neglect*;¹⁶⁷ *negligently* being derelict in his or her duties;¹⁶⁸ *negligently* damaging, destroying, or losing military property;¹⁶⁹ *negligently* suffering (causing or permitting) military property to be lost, damaged, destroyed, sold, or wrongfully disposed of;¹⁷⁰ *recklessly* wasting or spoiling non-military property;¹⁷¹ *negligently* causing or suffering a vehicle to be hazarded;¹⁷² or *recklessly* operating a vehicle.¹⁷³

Most notably, a service member is criminally liable under Article 108, Damage to Military Property, for allowing or permitting military property "to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be . . . injured by other persons; or loaning it to a person known to be

¹⁶⁶United States v. Valdez, 40 M.J. 491, 495 (C.M.A. 1994).

¹⁶⁷UCMJ art. 87 (1984).

¹⁶⁸*Id.* art. 92.

¹⁶⁹*Id.* art. 108.

¹⁷⁰*Id.* art. 108.

¹⁷¹*Id.* art. 109.

¹⁷²*Id.* art. 110.

¹⁷³*Id.* art. 111.

irresponsible, by whom it is damaged."¹⁷⁴ Yet, a service member may not be criminally liable for the same conduct toward his or her own child, unless the child dies or suffers some injury. For example, based on *Wallace*, if authorities had discovered Staff Sergeant Valdez's child eight hours before death, as opposed to after death, absent evidence of physical abuse (kicking), the government would have been unable to charge the accused.

D. The Failure of Adverse Administrative Actions

In the absence of criminal charges for child neglect under the UCMJ, commanders and prosecutors are forced to consider adverse administrative actions.

1. *Attempts at Installation Policies and Regulations*--Some military installations have published post policies or regulations providing guidance to service members on parental responsibilities. These publications tend to be vague, inconsistent from post to post, and most are not punitive.¹⁷⁵ Some attempts to implement punitive regulations fail because they do not include the necessary language explaining the potential use of criminal punishment for violations.¹⁷⁶ Additionally, most

¹⁷⁴*Id.* art. 108.

¹⁷⁵See *infra* notes 192-198 and accompanying text (sections entitled *Empirical Data: Problems Identified Through an Army Survey and Appendix A*).

¹⁷⁶*United States v. Blanchard*, 19 M.J. 196, 197 (C.M.A. 1985). Without the required language, the regulations are only guidance. *Id.*

focus only on the service member or civilian spouse's *failure to supervise children* (abandonment).¹⁷⁷ Whether or not they are punitive, civilian parents still face no criminal liability (except under state law); commanders can only take administrative action against civilians for violations of regulatory provisions.

Without a DOD standard in the area of criminal child neglect, the armed forces depend on individual service family advocacy programs and their implementing regulations; neither provide punitive sanctions. Installations that have developed nonpunitive regulations or policy letters to provide further guidance have not filled this gap.

2. *Withdrawal of Privileges and Benefits*--Another military response to criminal child neglect is termination of privileges. In some cases of civilian misconduct, administrative sanctions are effective. However, in child neglect cases, terminating a parent's access to government quarters; medical care; dental care; post exchange privileges; or commissary privilege,¹⁷⁸ is counterproductive. Withdrawing benefits may cause the child further suffering.

¹⁷⁷See notes 192-198 and accompanying text (sections entitled *Empirical Data: Problems Identified Through an Army Survey and Appendix A infra*).

¹⁷⁸See generally DA PAM. 27-21, *supra* note 85, para. 2-18 (discussion of basis for termination of benefits).

Moreover, when reviewing the lack of jurisdiction over civilians accompanying the force, the GAO noted the inadequacy of administrative sanctions for civilian misconduct.

"[A]dministrative sanctions generally do not provide credible punishment or deterrence and are often inappropriate to the offense in many cases, punishment given soldier-offenders was considerably more severe than the administrative 'slaps-on-the-wrist' given their civilian codefendants, causing morale problems among soldiers."¹⁷⁹ Aware of the inability of the United States to take action against civilians, "military investigators tend to give civilian cases low priority, and may do inferior investigative work in such cases."¹⁸⁰ Perhaps adding a federal criminal law would encourage investigator interest.

3. *Adverse Administrative Actions for Service Members Do Not Fill the Gap*--In the absence of criminal sanctions, commanders may use other administrative actions, such as administrative separations, in dealing with service member offenders,. However, without a punitive UCMJ article for child neglect, a commander cannot adversely separate a soldier from the Army for one incident of child neglect. Under the Army's personnel system, a commander may initiate adverse separations for: a conviction of a civil court;¹⁸¹ minor disciplinary

¹⁷⁹McClelland, *supra* note 119, at 178, (citing GAO Report, *supra* note 119, at 11-12).

¹⁸⁰*Id.* at 178, (citing GAO Report, *supra* note 119, at 10).

¹⁸¹DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS - ENLISTED PERSONNEL, para. 14-5 (17 Sept. 1990) [hereinafter AR 635-200].

infractions;¹⁸² a pattern of misconduct;¹⁸³ commission of a serious offense¹⁸⁴ or unsatisfactory performance.¹⁸⁵ For most of these enlisted separations, however, Army regulations require the commander to give the soldier written counseling (after the misconduct), followed by a reasonable opportunity to overcome deficiencies and a rehabilitative transfer (or waiver).

Of these types of separations, separation for a civil court conviction or commission of a serious offense does not require prior counseling. A civil court sentence of at least six months confinement or authorization of a punitive discharge under the *Manual for Courts-Martial*¹⁸⁶ (MCM) for a similar offense is required.¹⁸⁷ Without a punitive article, the second option does not apply to child neglect cases. Furthermore, the first scenario does not usually occur in cases where soldiers commit criminal child neglect. Hence, even in the cases where the civil court has convicted a soldier of criminal child neglect, (because the sentence is usually not over six months) adverse separation actions would require repeated failures.

¹⁸²*Id.* para. 14-12a.

¹⁸³*Id.* para. 14-12b (separation for discreditable conduct with civil or military authorities or conduct prejudicial to good order and discipline, which the ACCA has already held does not include criminal child neglect). *Id.*

¹⁸⁴*Id.* para. 14-12c.

¹⁸⁵*Id.* para. 13-2.

¹⁸⁶MCM, *supra* note 96.

¹⁸⁷AR 635-200, *supra* note 181, para. 14-5a.

Other adverse administrative actions are available to commanders, but these do not eliminate the soldier from the service. Bars to re-enlistment,¹⁸⁸ written reprimands,¹⁸⁹ and administrative reductions¹⁹⁰ provide some deterrent, but the commander still must wait for subsequent misconduct that may result in further harm. Administrative sanctions require the system itself to eventually force the soldier out of the service. Unless the soldier requests a discharge after he receives a bar to re-enlistment,¹⁹¹ the commander must wait until the soldier falls within the parameters of another type of separation.

E. Empirical Data: Problems Identified Through an Army Survey

To identify other problems occurring on installations and to verify the extent of the problem of child neglect, questionnaires were mailed to Army Staff Judge Advocates.¹⁹² The questionnaires

¹⁸⁸See DEP'T OF ARMY, REG. 601-280, TOTAL ARMY RETENTION PROGRAM, ch. 6 (17 Sept. 1990) [hereinafter AR 601-280] (commander must impose a bar to re-enlistment, if service member fails to have an approved family care plan within 2 months of counseling) DEP'T OF ARMY, REG. 600-20, COMMAND POLICY, ch. 5 (30 Mar. 1988) (IO2, 1 Apr. 1992) [hereinafter AR 600-20]; AR 601-280, para. 6-4e (IO3, 27 Nov. 92).

¹⁸⁹See generally DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

¹⁹⁰See DEP'T ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS, ch. 6 (1 Nov. 1991) (reduction for civil conviction or inefficiency).

¹⁹¹See AR 635-200, *supra* note 181, para. 16-5; AR 601-280, *supra* note, para. 6-5f.

¹⁹²130 surveys were mailed on 25 November 1994 and responses were received until 4 March 1995. A total of 53 responses were received. Appendix A, *Army Staff Judge Advocate Questionnaire: Summary of Responses*, *infra*, provides a summary of survey questions, summarizes responses to questions not requiring a

included questions for the Staff Judge Advocate's Family Advocacy Management Team (FACMT) representative, and Chiefs of Criminal Law Divisions.¹⁹³ This survey was not intended to provide statistical data about child neglect, but merely to identify common difficulties in the military community when dealing with child neglect cases. Respondents verified that child neglect is a common problem in the military community. The respondents also provided insight into common procedural difficulties, particular cases, and different responses.¹⁹⁴

Survey respondents identified many problems involving relationships between military and civilian authorities when investigating child neglect on post. Some installations had problems obtaining agreements, while others had problems with existing agreements. Some installations whose boundaries extended into two states were able to obtain Memoranda of Agreement or Understanding from one state, but not another state. This causes inconsistent results among like cases. In one area

commentary, and a compilation of data. [hereinafter Appendix A] For problems identified in the text see Appendix A. Some responses were not included in the total number of responses (T), because the answers were nonresponsive. For example, if respondents included abuse with neglect cases in providing total case numbers, the answer for that question was not included in the data compiled. Some questionnaires were sent out separately, but returned under one cover; those responses were counted separately.

¹⁹³See Appendix A, *supra* note 192, a general overview of survey questions and applicable responses.

¹⁹⁴Due to difficulty in obtaining data from civilian authorities, judge advocates were not asked about the civilian authorities' criminal actions against service members and civilian spouses.

of the installation, cases may be handled differently than cases arising in other areas. Other installations, that have retrocession agreements between the military and the state, still have problems allocating responsibilities and resources between the post and the state. Some states cooperated with the military, but refused to sign a Memorandum of Agreement or a Memorandum of Understanding.

Inconsistencies were apparent within the same states. Some states with more than one installation within state boundaries made retrocession agreements with only one installation, but no agreement of any kind with the other military installation.

Survey respondents also indicated that multi-agency investigations took place. Some respondents described communication problems between military and civilian agencies, such as problems obtaining information from civilian authorities and gaining their participation in military committee meetings. Other respondents reported that military investigators did not want to investigate because the military investigators do not see any "criminal offense."

Respondents abroad reported that many families are non-command sponsored. As a result, many individuals do not report child neglect for fear of negatively affecting the soldier's career. These respondents indicated that most host nations do not have organizations equivalent to state child protection

agencies which caused additional problems. Also, although non-command sponsored children may not have access to DOD schools, parents do not always enroll them in private, expensive schools overseas.

Data compilation provided some beneficial information. For example, a general observation about the family advocacy program is noteworthy. Survey respondents indicated a lower percentage of spouses, as compared to soldiers, subsequently enrolled in the family advocacy program. Although the respondents did not specify why they did not enroll these spouses, this lower percentage may be due to the fact that civilian spouses did not voluntarily participate in the program. As one survey respondent noted, civilian spouses are only asked to participate in FACMT; "we have no enforcement power over civilians." Survey data also indicated a higher rate of child neglect on post as compared to off post; and a high incident rate of children removed from soldiers' homes because of child neglect.¹⁹⁵

Chiefs of Criminal Law Divisions provided information about how commanders are responding to the problems with punitive options. Several respondents reported that commanders ordered soldiers to correct the situations of child neglect.¹⁹⁶ The surveys indicated those soldiers were repeat offenders, who

¹⁹⁵See Appendix A, *supra* note 192, questions 2, 8, 9.

¹⁹⁶These were substandard living conditions; malnutrition; failure to clothe; and poor personal hygiene.

violated the order and were charged with failure to obey a superior commissioned officer's lawful order. The survey respondents provided examples of many of their cases involving egregious facts.¹⁹⁷

A large majority of survey responses indicated that installations attempt to fill the gap with post regulations and policies. However, these regulations or policies differ from installation to installation. Each installation's guidelines focused on different parental requirements. Some installations have policies, while others have regulations. Some installations focus on supervision of minors, while others focus on safety. Some installations use words of criminality, but fail to provide appropriate notice to the soldiers.¹⁹⁸ Some supplemented the

¹⁹⁷ Several survey respondents provided descriptions of cases from their installations. Several judge advocates reported cases when a soldier left dependent children alone in quarters while they were assigned TDY. One installation reported a dual military couple who left their two children in quarters alone for several weeks while the parents went on vacation. One installation reported a case where the military judge dismissed a child neglect specification under Article 134 both clause 1 and 2, based on the *Wallace* decision. The case involved a parent who failed to obtain the necessary medical care for his abused child. Many installations reported egregious fact scenarios. For example, at one installation a child was discovered in government quarters strapped to a car seat, on the floor of a bedroom surrounded with substandard conditions.

¹⁹⁸ See *United States v. Blanchard*, 19 M.J. 196, 197 (C.M.A. 1985). Some respondents provided copies of the installation regulations or policies; and other respondents summarized the terms within their installation regulation or policy. Most regulations or policy letters from respondents were not punitive and focused on supervision of children. See *Appendix A, supra* note 192, questions 6, 7, and 12 (identifying common categories regulations and policy letters addressed).

definition of child neglect already published in the Army's regulations. Within the category of supervision, some of the following elements differed within each post policy or regulation: authorized periods of unattendance, ages of the child, locations, and baby-sitter qualifications. In essence, a soldier could permanently change station and his parental responsibilities, as provided in installation policies or regulations, would drastically change from installation to installation.

Overall, survey responses reflected the many inconsistencies in the way the Army handles criminal child neglect and verified the need for unified standards.

V. Why the Military and Society Disregard Child Neglect and Why They Should Not

The survey reinforced that child neglect occurs throughout the military community. Although research also indicates that child neglect is more prevalent than child abuse nationally, and its consequences are as serious as abuse, media focus, political debate, and research and practice literature have concentrated on child abuse.¹⁹⁹ Moreover, three additional problems have prevented child neglect from becoming legally actionable. First, "state legislatures, courts, and societies historically tended to

¹⁹⁹See Wolock, *supra* note 18, at 530.

view psychological, intellectual, social, moral, and emotional injuries as nebulous and insignificant."²⁰⁰ Furthermore, "lawmakers and judges hesitate to interfere with family autonomy."²⁰¹ Lastly, "[T]he mounting problem of physical abuse . . . casts a shadow of futility" over attempts to deal with the less immediate problem of child neglect.²⁰² However, these obstacles can, and should, be overcome.

A. *Child Neglect Is Not a Nebulous and Insignificant Problem*

Child neglect is the predominant type of child maltreatment in our nation. Statistics indicate that it also is a wide-spread occurrence in the military community.

1. *National Incidence of Child Neglect*--The National Center on Child Abuse and Neglect (NCCAN) reports that "[i]n 1992 there were nearly 1.9 million reports received and referred for investigation on approximately 2.9 million children who were alleged subjects of child abuse and neglect."²⁰³ Furthermore, as depicted in Figure 1, with forty-nine states reporting, forty-nine percent of substantiated or indicated child victims suffered

²⁰⁰Kincanon, *supra* note 50, at 1043-1044 (footnote omitted).

²⁰¹*Id.*

²⁰²*Id.*

²⁰³CHILD MALTREATMENT 1992, *supra* note 116, at 9. This total was based on reports from all 50 states and the District of Columbia.

from neglect, three percent suffered from medical neglect, and five percent suffered from emotional maltreatment.²⁰⁴

The National Committee to Prevent Child Abuse estimated that in 1993, 2,989,000 children were reported for maltreatment, and forty-seven percent of those children, 1,404,830 children, were reported for neglect.²⁰⁵ In addition, of the 1,299 children who died from maltreatment, forty-three percent of those deaths were due to neglect.²⁰⁶

The National Resource Center on Child Abuse and Neglect estimates that eight of every 1,000 children experience physical neglect, and 4.5 of every 1,000 children suffer from educational neglect.²⁰⁷ Furthermore, approximately three of every 1,000 children are victims of emotional neglect.²⁰⁸

2. *Incidence of Child Neglect in the Military Community*--"A high proportion of American children are poor . . . ill-fed, poorly housed, and effectively cut off from decent medical attention and preventive health care."²⁰⁹ That fact could account for the high rate of child neglect nationwide. So what is the

²⁰⁴*Id.* at 14.

²⁰⁵Resource Center Child Neglect Information Sheet, *supra* note 27.

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹Coons, *supra* note 31, at 308.

rate of child neglect in the military community where the government provides free medical care and housing?

The amount of child neglect present in the military community is, unfortunately, comparable to the occurrence rates nationwide.²¹⁰ Many parents in the military community are part of family structures more inclined to commit child neglect. For example, the military community includes many single parent military members; dual military parents; and young soldiers with poor parenting skills and with insufficient income to support their children.²¹¹

Single parents, who may find it more difficult to care for children, are common in the military community. Specifically, 5.7% of the Army and 4.3% of the Marine Corps are single parents.²¹²

Many of our military members are young and lack parenting skills. Almost sixty-five percent of the military force is age thirty or younger, while only forty-five percent of the civilian workforce is under age thirty.²¹³ Moreover, with a DOD workforce consisting of 1,386,166 enlisted members, 218,379 are twenty

²¹⁰See CHILD MALTREATMENT 1992, *supra* note 116.

²¹¹See BLANCHARD, PROTECTING CHILDREN, *supra* note 98, at 9.

²¹²Also, 5.5% of the navy and 5.4% of the air force. MILITARY DEMOGRAPHICS, *supra* note 113, at 35. The report in this area is based on 1992 statistics from the Defense Manpower Data Center. Also, the majority of single parents are in the enlisted pay grades E5-E6 and then E7-E9. *Id.*

²¹³*Id.* at 10. These statistics are based on 1994 figures.

years old or younger and 466,582 are between twenty-one and twenty-five years old.²¹⁴

Young military members and single members, who are parents, depending on their "knowledge, experience, social supports, and environment,"²¹⁵ may be unable to "accurately assess the best interests of their children."²¹⁶ Depending on their own background and rearing, some military parents may not understand their parental responsibilities.

Notably, a majority of service members have children. Specifically, within the armed forces, 28.6% of E1-E4 have children; 61.1% of E5-E6 have children and 73.7% of E7-E9 have children.²¹⁷

Moreover, the NCCAN reports that our "youthful organization" causes a number of risk factors in some military families, like the large amount of young military members (in low pay grades) with young spouses and children, who reside off post.²¹⁸ The center reports that these families are at high risk due to their low pay (some may qualify for food stamps); limited home

²¹⁴*Id.* at 10. These statistics are based on 1994 figures.

²¹⁵Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 596 (1992).

²¹⁶*Id.*

²¹⁷MILITARY DEMOGRAPHICS, *supra* note 113, at 31. The statistics in this area are based on 1992 information from the Defense Manpower Data Center. *Id.*

²¹⁸BLANCHARD, *PROTECTING CHILDREN*, *supra* note 85, at 9.

management skills; limited training in parenting; and isolation from extended family and military support organizations on-post.²¹⁹

Certain conditions within the military community cause an increase in poor parenting. Adverse conditions that affect parenting behaviors, such as physical, emotional, economic, or cultural stress, can cause a parent to become unable to meet the child's needs.²²⁰ Adverse factors causing stress include long separations, frequent transfers, isolation from family and friends, lack of job choice, and high risk jobs.²²¹ All types of stress exist in a readily deployable military force that requires service members and their families to repeatedly and, at times, rapidly change station.

Whatever the causes, the military community has an extensive number of substantiated child neglect cases. As Figure 2 depicts, in calendar year 1992 of 8584 substantiated victims of child abuse the armed services in the continental United States (CONUS) reported 2750 were due to neglect; 154 suffered from medical neglect; and 802 were victims of emotional

²¹⁹*Id.*

²²⁰McMullen, *supra* note 215, at 595.

²²¹Slide/Tape Briefing: Guidelines for Presentation, Dep't of Navy, for Commander, Naval Military Personnel Command, subj: Navy Family Advocacy Program: The Role of the Commanding Officer 11 (1994).

maltreatment.²²² Also in 1992, OCONUS armed services reported 1853 substantiated victims of abuse and neglect, including 641 victims of neglect; 42 victims of medical neglect; and 218 victims of emotional maltreatment.²²³

Tables 1 through 4 are based on DOD statistics and reflect fiscal years (FY). Table 1 shows the trend in the number of substantiated child neglect cases in the military. As indicated, each fiscal year, substantiated child neglect cases have remained high. Tables 2, 3, and 4 further depict the percentage of each type of maltreatment for FY 1990, 1991, and 1992. As indicated, deprivation of necessities alone encompassed thirty-five percent in FY 1990; thirty-eight percent in FY 1991; and thirty-one percent in FY 1992 of the total substantiated reports of child abuse and neglect DOD wide.²²⁴ Statistics support the contention that child neglect is not insignificant.

²²²CHILD MALTREATMENT 1992, *supra* note 116, at 42. Additionally, CONUS armed forces reported 2,841 were due to physical abuse and 1,522 were due to sexual abuse. *Id.*

²²³*Id.* Emotional maltreatment includes both emotional neglect and emotional abuse. Additionally, OCONUS armed forces reported 652 were due to physical abuse and 195 were due to sexual abuse. *Id.*

²²⁴DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1990 (Jan. 1991); DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1991 (Mar. 1992); DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1992 (May 1993) Tables 2, 3, and 4, were also taken from these DOD reports. Neglect, as defined in this thesis, falls into two DOD categories listed: "deprivation of necessities" and "emotional maltreatment."

B. Intervention Does Not Disrupt Parental Autonomy

Once in agreement that child neglect is a significant problem and criminal statutes are necessary, lawmakers then address concerns about disturbing family autonomy. The imposition of criminal liability for child neglect faces serious opposition among lawmakers and child protective agency practitioners. Like society, these officials face a dilemma involving the balancing interests of the child, the parent, and the state. As a result, states take different approaches with varying degrees of intervention; and such responses to the problem of child neglect are inconsistent from state to state. Additionally, disagreement among lawmakers who have different opinions about the acceptable level of state intervention, impedes a national or unified solution.

Opponents of criminal child neglect statutes voice constitutional concerns about these statutes. Opponents contend that government intervention violates the Fourteenth Amendment which prohibits any state from depriving "any person of life, liberty, or property, without due process of law."²²⁵ Moreover, the Fourteenth Amendment protects both the parent's personal freedom and unfettered discretion to raise a child, and the child's right to live free from government intervention.

²²⁵U.S. CONST. amend. XIV, § 1.

Constitutional issues also arise when lawmakers debate whether to enact a religious accommodation provision for parents who use prayer as medical treatment. Constitutional issues concerning the parent's right to free exercise of religion (and freedom from prosecution) and whether religious exemption statutes violate the Establishment Clause, also impede enacting criminal child neglect statutes.

To withstand judicial scrutiny, criminal child neglect statutes must not unduly and unjustifiably interfere with family autonomy and parental rights. State statutes must pass the United States Supreme Court's constitutional standard of review, balancing parent's rights with the state's authority to promote health and welfare of its citizens.²²⁶

The government attempts to protect children who are abused or neglected and as a result, our society faces complex decisions about competing interests, values and resources.²²⁷ Although the Supreme Court has given parents broad discretion in raising children, neglected children are in danger and cannot help themselves. Therefore, the state's interest in and protection of its minor citizens who are endangered outweighs the parent's interest in family autonomy and parental rights.

²²⁶Kincanon, *supra* note 50, at 1053.

²²⁷Mindy S. Rosenberg & Robert D. Hunt, *Child Maltreatment: Legal and Mental Health Issues*, in *CHILDREN, MENTAL HEALTH, AND THE LAW* 79 (N. Dickon Reppucci & Lois Weithorn eds., 1984).

Parental rights are rights parents have in controlling their children. Similarly, "family autonomy," a derivative of individual privacy, is the assumption that adult family members should be allowed to freely exercise their rights to privacy in family decision-making, without state intervention.²²⁸

The furtherance of the public good or the balancing of individual and family interests sometimes forces courts to compromise individual and family autonomy.²²⁹ "With progress in individual rights, the courts address two dominant ideals: (1) the right of the child to be free from the harm of abuse and neglect, and (2) the right of the American family to be free from undue government influence and interference."²³⁰

1. *The Legal History of Parental Rights: Balancing The Fundamental Personal Liberties of Parents and Children*--The Supreme Court has repeatedly reinforced society's deference to parental authority in all areas of child rearing, including educating and training their young.²³¹ In essence, deference to parental authority with respect to the care, custody, and control of children, supports society's fostering of "social pluralism and diversity."²³² Although not true in many instances, the

²²⁸McMullen, *supra* note 215, at 570.

²²⁹Peggy C. Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1372 (1994).

²³⁰McGovern, *supra* note 17, at 207.

²³¹Garrison, *supra* note 44, at 1770-1771.

²³²*Id.* at 1770.

importance of family autonomy and privacy is based on the assumption that "privacy strengthens families" and "parents will act in the best interests of their children."²³³ Reflecting Western civilization's concepts that a family unit includes broad parental authority over children, the courts and "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'"²³⁴

In 1923, in *Meyer v. Nebraska*,²³⁵ the Supreme Court announced in that the "right of the individual . . . to marry, establish a home and bring up children"²³⁶ was a liberty protected under the Due Process Clause of the Fourteenth Amendment.

In 1925, the Court reaffirmed this liberty interest in *Pierce v. Society of Sisters*,²³⁷ by finding an Oregon statute requiring children to attend public schools unconstitutional. The Court held that the act unreasonably interfered "with the

²³³McMullen, *supra* note 215, at 569.

²³⁴*Parham v. J.R.* 442 U.S. 584, 602 (1979) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

²³⁵262 U.S. 390, 399 (1923) (holding that a state statute forbidding the teaching of any language except English in the first eight grades, exceeded the power of the state and infringed on the liberties guaranteed under the Fourteenth Amendment).

²³⁶*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²³⁷268 U.S. 510 (1925).

liberty of parents and guardians to direct the upbringing and education of children under their control."²³⁸

In 1944, in *Prince v. Massachusetts*,²³⁹ the Court again confirmed the existence of parental rights and responsibilities, but with limitations. Upholding a state child labor law and the conviction of a custodian of a minor who permitted the child to work contrary to the law, the Court recognized the private realm of family life while placing boundaries on "parental rights" and family autonomy." The Court stated that "the family itself is not beyond regulation in the public interest" and "rights of religion nor rights of parenthood are beyond limitation."²⁴⁰

Over twenty years later, in *Griswold v. Connecticut*,²⁴¹ the Court identified the "constitutional right to privacy" as further protection for parents and the family unit. Although not enumerated in the Bill of Rights, the Court stated that "penumbral rights of 'privacy and repose'" are "formed by emanations from those guarantees that help give them life and substance."²⁴² As Justice Goldberg stated in his concurring

²³⁸*Id.* at 534-535. However, the Court decided both these cases during a time when the Court generally protected liberty interests.

²³⁹321 U.S. 158 (1944).

²⁴⁰*Id.* at 166.

²⁴¹381 U.S. 479 (1965) (holding a Connecticut statute prohibiting use of contraceptives violated the right of marital privacy). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that an Amish family's decision not to send child to high school was protected).

²⁴²*Id.* at 484-485.

opinion, "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."²⁴³

In 1972, in *Wisconsin v. Yoder*²⁴⁴ the United States Supreme Court verified the conditions on the "power of the parent."²⁴⁵ The Court again authorized intervention when it appeared that parental decisions would "jeopardize the health or safety of the child, or have a potential for significant social burdens."²⁴⁶

These cases establish that the Supreme Court has recognized "parental rights" and "family autonomy" throughout history, but not without limitations. The Court has allowed government intervention to infringe on fundamental liberties and rights of parents and children when the child needs state protection. The state may act "to guard the interest in youth's well being" and may act as "parens patriae" to restrict the parent's control.²⁴⁷ Furthermore, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."²⁴⁸

²⁴³*Id.* at 495 (Goldberg, J. concurring).

²⁴⁴406 U.S. 205 (1972).

²⁴⁵*Id.* at 233.

²⁴⁶*Id.* at 234.

²⁴⁷*Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

²⁴⁸*Id.* at 167. The Court went further and stated "and that includes, to some extent, matters of conscience and religious conviction." *Id.*

The Court has placed boundaries on "family autonomy" and "parental rights" because parental interests include rights and duties, entitlements and obligations. "The Supreme Court has given high priority to the right of parents to direct the upbringing of their children, but that very liberty has received constitutional protection in no small part because it also reflects the social responsibility of parents."²⁴⁹

Once parents fail to fulfill their obligations and parental responsibilities, the state's interest in protecting the neglected child outweighs the parent's interest in autonomy. Protection of family autonomy and individual privacy, although valuable, "should not mean that children must be stuck with the luck of the draw in having their needs fulfilled."²⁵⁰ That child development and needs may be difficult to identify, should not prevent "society from requiring that all children have access to certain developmentally positive resources."²⁵¹ Accordingly, states have authority to intervene when parents fail to fulfill their obligations.

2. *Medical Decision Making: Religious Freedom*--One could contend that criminal child neglect statutes interfere with

²⁴⁹Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 475 (1983).

²⁵⁰McMullen, *supra* note 215, at 597.

²⁵¹*Id.* at 597.

constitutionally protected religious freedom. However, twenty-one states and the District of Columbia have enacted various types of religious exemption statutes exempting parents from criminal liability or providing a defense for child neglect offenses.²⁵²

During the 1960s, in conjunction with the establishment of child abuse reporting laws, several states enacted religious accommodation statutes.²⁵³ Between the 1970s and 1980s the federal government first encouraged exemptions and then changed its position.²⁵⁴ Today, many jurisdictions still have provisions for prayer treatment. Such statutes differ in approach and content, and use different descriptive language to explain acceptable religious treatment in lieu of medical treatment.

For example, several state religious accommodation statutes exempt parents from the category of potential offenders by including phrases such as the following: "a person does not

²⁵²Many jurisdictions also have religious exemption provisions for their civil protective statutes. However, this thesis only addresses such exemptions in criminal child neglect statutes.

²⁵³Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 564 (1990).

²⁵⁴In 1974, the federal Child Abuse Prevention and Treatment Act encouraged religious accommodation provisions in their guidelines, and granted funds to states enacting laws in accordance with those guidelines; subsequently in 1987, the revised guidelines deleted the requirement for a religious accommodation provision. *Id.* at 564. See also Wadlington, *supra* note 44.

commit nonsupport or endangerment if"²⁵⁵ or "there is no failure to provide medical care if"²⁵⁶ or "nothing under the definition of 'child endangerment' shall be construed to mean."²⁵⁷ Other states provide religious healing as an affirmative defense to specific crimes. In Delaware, the religious accommodation provision is an affirmative defense to the crime of child endangerment;²⁵⁸ while in Indiana, it is a defense to the crimes of criminal nonsupport²⁵⁹ and criminal neglect.²⁶⁰

Another difference among accommodation statutes is the language describing "acceptable" religious practices that can serve in lieu of medical treatment. Some states require religious healing "in accordance with tenets and practices of an *established church or religious denomination*"²⁶¹ or "*a recognized church or religious denomination.*"²⁶² Other states require healing "by adherents of a *bona fide religious denomination* that relies exclusively on this form of treatment in lieu of medical attention."²⁶³ Some states require that an accredited

²⁵⁵See ALA. CODE § 13A-13-6 (1994).

²⁵⁶See ALASKA STAT. § 11.51.120 (1994).

²⁵⁷See KAN. STAT. ANN. § 21-3608 (1993)

²⁵⁸DEL. CODE ANN. TIT. 11, § 1104 (1994).

²⁵⁹IND. CODE ANN. § 35-46-1-5 (West 1995).

²⁶⁰IND. CODE ANN. § 35-46-1-4 (West 1995). See also ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1993) (a religious accommodation statute providing an affirmative defense to only capital murder resulting from a parent's failure to provide medical treatment).

²⁶¹See ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1993).

²⁶²KAN. STAT. ANN. § 21-3608 (1993). See also LA. REV. STAT. ANN. § 14:93(B) (1985), which requires a "well-recognized religious method of healing."

²⁶³OR. REV. STAT. § 163.555 (1994).

practitioner conduct the healing;²⁶⁴ and other states require that the defendant be an adherent or a member of the denomination.²⁶⁵

Whatever the statutory language, religious exemption statutes raise constitutional concerns. Lawmakers are concerned with two issues: (1) whether or not prosecuting parents who use religious treatment as a form of medical treatment violates the Free Exercise Clause; and (2) whether the statutory prayer exemptions to neglect statutes violate the Establishment Clause.

State exemption statutes discussed here are religious accommodation provisions for criminal statutes encompassing child neglect. When a child dies, if there is a prayer treatment exemption for only the criminal child neglect statute or civil protective statute, some states prosecute parents under other

²⁶⁴See D.C. CODE ANN. § 2-1356 (1993).

²⁶⁵See W. VA. CODE §§ 61-8D-2, 61-8D-4 (1994). Also, some states require that the defendant rely only on religious healing. These statutes include language such as: "treatment solely by spiritual means through prayer." See VA. CODE ANN. § 18.2-371.1 (Michie 1994); or "medical attention provided by treatment by prayer through spiritual means alone." See OR. REV. STAT. § 163.555 (1994). See COLO. REV. STAT. § 19-3-103 (1993) (requiring that the defendant *legitimately* practice treatment by spiritual means through prayer in accordance with a recognized method of religious healing. Colorado further states that the method is presumed recognized if either: the fees and expenses for the treatment are tax deductible under the Internal Revenue Service rules and those fees and expenses are reimbursable health care expenses under medical insurance from insurers the state has licensed; or the religious treatment has a success rate equivalent to medical treatment. In addition, Colorado explicitly states that parents cannot limit the access of the child to medical care in "life-threatening situations" or conditions that will result in serious disability.) *Id.*

criminal statutes, such as manslaughter, negligent homicide, or homicide.²⁶⁶ Opponents argue that prosecution is excessive government intervention into both a parent's right to free exercise of religion and parental freedom to use religious healing.

In contrast, opponents of the religious accommodation statutes argue that religious healing exemptions themselves violate the Establishment Clause as an impermissible government established religion.

These constitutional arguments involve the First Amendment to the United States Constitution that states "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁶⁷ The first half of this phrase is the Establishment Clause and the second half is the Free Exercise Clause. Additionally, these First Amendment prohibitions, as incorporated by the Due Process Clause of the Fourteenth Amendment, apply to the states.²⁶⁸

²⁶⁶See *Walker v. People*, 763 P.2d. 852 (Cal. 1988), cert denied, 491 U.S. 905 (1989); *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992); and *Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass 1993). See also *Wadlington*, *supra* note 44; *Clark*, *supra* note 253.

²⁶⁷U.S. CONST. amend. I.

²⁶⁸*Laura M. Plastine, "In God We Trust": When Parents Refuse Medical Treatment For Their Children Based Upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123, 125 n.4 (1993) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

In both arguments, the state generally wins. Parents who claim they are practicing the "free exercise of religion" are only protected to the extent the state allows; like parental rights, the right to free exercise of religion has limits. States can intervene when the child is facing life-threatening conditions. Under the Establishment Clause, the state can enact a religious accommodation statute if the statute does not excessively entangle church and state, and it fulfills the United States Supreme Court's three-prong test set out in *Lemon v. Kurtzman*.²⁶⁹

Embodied within the Free Exercise Clause are "the right to believe and the right to act in accordance with that belief."²⁷⁰ States may not interfere with the right to believe, but may interfere with the right to act on that belief. The extent of permissible state intervention depends on the standard of judicial review of the statute.

The United States Supreme Court has changed the judicial standard of review for statutes interfering with religious freedom. In the 1960s and 1970s, the standard was strict scrutiny,²⁷¹ requiring the state to show that although burdening

²⁶⁹403 U.S. 602, 612-13 (1972); Clark, *supra* note 253, at 581 (citation omitted).

²⁷⁰Plastine, *supra* note 268, at 126.

²⁷¹See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Wisconsin was required to grant a religious exemption to the Amish religious denomination, to the law requiring public school attendance, unless state could demonstrate a compelling state interest). See also *Sherbert v. Verner*, 374 U.S. 398 (1963).

the free exercise of religion, it used "the least restrictive means of achieving a compelling state interest."²⁷² More recently, the Court, supporting the state's interest in the child's health and welfare, has turned to the less rigorous rational basis test.²⁷³

²⁷²Plastine, *supra* note 268, at 130.

²⁷³See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that the state may restrict a person's right to act to support their religious beliefs and that the Free Exercise Clause did not require the state to provide an exemption, for citizens whose religious beliefs may conflict, from generally applicable criminal laws; Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 341 (1991)). Specifically, the Court rejected the respondent's claim for a religious exemption (for Native Americans) from an Oregon law prohibiting sacramental peyote use and denial of unemployment benefits to persons discharged for such use. In addition, the Court found that the state statute did not call for a strict scrutiny review. The Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dep't of Human Resources*, 494 U.S. at 879 (citation omitted). In addition, the Court stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-879. In this decision, the Court affirmed its 1944 decision in *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding a criminal conviction of a Jehovah's Witness, a child's custodian, who gave the child pamphlets to distribute in violation of child labor laws). *Id.* This case and others have initiated a conservative trend that has reinstated the less rigorous rational basis standard of review. Plastine, *supra* note 268, at 137. However, one change that might cause a reinstatement of the strict scrutiny standard is the recently passed Religious Freedom Restoration Act. Codifying "strict scrutiny," this act explicitly prohibits any federal or state law from substantially burdening the exercise of religion without a compelling state interest and the least restrictive means. Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions*

Regardless what standard of review courts use, the Free Exercise Clause will not bar prosecution of faith healing parents for their failure to provide medical care to their children.²⁷⁴ States have "a compelling interest in protecting children whose lives are in imminent danger, and prosecution is narrowly tailored to achieve that interest."²⁷⁵ The Supreme Court has supported the state's ability to limit religious exemptions for certain criminal statutes, such as manslaughter, and has recognized that the right to act in support of religious beliefs is limited.²⁷⁶ However, states have complied with the requests of many groups who practice prayer healing, by enacting religious exemptions to the criminal child neglect statutes.

States that have spiritual healing exemptions may allow exemption to criminal child neglect charges, but not necessarily to other crimes. Many states still take action by either declaring the child neglected and removing the child from the parent²⁷⁷ or if the child dies from refusal of medical treatment,

on the *Prosecution of Faith Healing Parents*, 29 U.S.F. L. Rev. 43, 75 (1994) (citing 42 U.S.C.A. §2000bb-1(a)-(b) (West Supp. 1994)).

²⁷⁴Rosato, *supra* note 273, at 76.

²⁷⁵*Id.* at 76.

²⁷⁶See *supra* note 273 (discussing applicable caselaw).

²⁷⁷"[T]he State can . . . remove the child from the parent's custody temporarily, placing the child in the custody of a guardian ad litem, who will order the necessary medical treatment for the child." Plastine, *supra* note 268, at 141.

the state can prosecute the parent for murder (citing the parent's violation of the endangerment statute as negligence).²⁷⁸

The first type of state action, noted above, is an intervention based on the civil child neglect protective statutes, where the state acts as *parens patriae*.²⁷⁹ Based on the priority of the preservation of a child's life, neither First Amendment Free Exercise Clause defenses, nor Fourteenth Amendment Due Process Clause "parental rights" contentions, are usually successful.²⁸⁰

The second state action cited above is "after the fact" criminal prosecution that faces tremendous opposition, but is upheld in numerous state courts. States who have religious exemptions may still prosecute parents whose prayer treatment, and inadequate medical care, resulted in their child's death. To some extent, the parents relied on the religious accommodations. It appears to parents that the government permits faith healing under one statute and criminally prosecutes under another when prayer treatment fails.²⁸¹ State prosecutions of these parents

²⁷⁸*Id.*

²⁷⁹*Id.* at 142. In such cases the state, acting as *parens patriae*, intervenes with the parental decision and ensures that the child receives the required medical treatment. This usually occurs in cases where the "life of the child is in imminent danger" and the spiritual healing exemptions to the civil protective neglect statutes are deemed inapplicable. *Id.*

²⁸⁰*Id.* at 143.

²⁸¹Judith I. Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429, 1441-1442 (1990).

are facing challenges that the states are violating the defendant parents' Due Process rights for failure to give notice of the criminal offense and their First Amendment Free Exercise rights. Defendants argue that states are interfering with the free exercise of their religion, but some courts support the state.²⁸²

The second constitutional concern about religious accommodation statutes is the contention that these statutes may violate the First Amendment Establishment Clause. However, unless the statute specifically names a religion, this complaint is unsuccessful; "[w]hen government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."²⁸³

²⁸²Furthermore, defendants contend that the exemptions, when read with the criminal statutes, "are unconstitutionally vague and do not give parents fair notice of their potential liability." Monopoli, *supra* note 273, at 350. In many cases, state courts have supported these prosecutions. The debate is beyond the scope of this thesis. For other articles about this conflict see John T. Gathings Jr., Comment, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise Versus His Child's Right to Life*, 19 CUMB. L. REV. 585 (1989); Scheiderer, *supra* note 281; Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991); J. Nelson Thomas, *Prosecuting Religious Parents for Homicide: Compounding a Tragedy?*, 1 VA. J. Soc. POL'Y & L. 409 (1994); and Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. LEGIS. 135 (1993).

²⁸³*Gillette v. United States*, 401 U.S. 437 (1971). The two types of prohibited legislation under this constitutional proscription are: those laws providing all religions one uniform benefit; and those that discriminate between religions. The first group must pass the three part Lemon test, while the second must not provide preferential treatment to any one particular denomination. Unless they grant accommodation specifically to

According to the test the Supreme Court announced in *Lemon v. Kurtzman*²⁸⁴ for excessive government interference, religious accommodation statutes must have a secular purpose, neither advance nor inhibit religion, and must not foster excessive entanglement.²⁸⁵ Based on these requirements, state religious accommodation statutes do not violate the Establishment Clause. Religious accommodation statutes, in general, have a secular purpose because they are designed to guarantee "fundamental first amendment rights," and therefore, "[D]o not contravene the establishment clause."²⁸⁶ These statutes do not establish or endorse religion, but "serve to distinguish the intent traditionally associated with child abuse from the intent of parents who simply choose one form of treatment over another."²⁸⁷ Exemption statutes ensure equal treatment of parents who choose either medical or spiritual health care, while criminally punishing parents who commit willful neglect or maltreatment of children.²⁸⁸

one denomination, most religious accommodation statutes can pass both of these standards. Monopoli, *supra* note 273, at 345.

²⁸⁴403 U.S. 602 (1971).

²⁸⁵*Id.*

²⁸⁶Clark, *supra* note 253, at 581. (citing *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring)).

²⁸⁷*Id.* at 581.

²⁸⁸*Id.* at 582. However, there may be a valid concern if the religious accommodation statute indicates a preference for one denomination. For example, prayer healing exemptions only for parents that either: have a "duly accredited practitioner" treat the child in lieu of medical treatment; or who are members of a "recognized" religion; or who are members of a "denomination," may not withstand direct constitutional challenge. Only specific

Lastly, religious accommodation provisions do not foster excessive entanglement; and do not require an intrusion into either church or state. When the courts do inquire into the defendant's religious practices, it does not involve "prohibited entanglement through administrative schemes or intrusion into church doctrine."²⁸⁹

Although constitutionally valid, states should not enact these religious accommodation statutes to criminal child neglect statutes or in the alternative, the states should clarify the statutes. Exemptions create expectations of immunity and due process arguments.²⁹⁰ Justifiably, the National District Attorneys Association advocates against religious exemptions for child abuse crimes.²⁹¹

C. A Difficult Problem, But Not Futile: A Comparison of State Criminal Statutes

Aside from constitutional hurdles, society, lawmakers, and judges tend to focus on child abuse rather than neglect. Although child abuse appears a more immediate concern, states also have addressed child neglect in criminal statutes. Some

religions can fulfill these requirements, and as a result, the statutes indicate a preference. *Id.* at 582-583.

²⁸⁹*Id.* at 584. But See Scheiderer, *supra* note 281.

²⁹⁰Scheiderer, *supra* note 281, at 1445.

²⁹¹Resolution Concerning Child Abuse and Neglect, National District Attorneys Association (July 24, 1994).

lawmakers may feel that child neglect is a "futile problem," but there is extensive state legislation criminalizing child neglect.

1. *Why Should Child Neglect Be Criminalized?*--State legislatures have recognized that child neglect is not so "nebulous" to preclude its criminalization.²⁹² States have implemented criminal sanctions for child neglect because the availability of punitive action may deter others and reduce the incidence of child neglect; there is a need to punish the offenders; and to address a prevalent offense involving a victim, with documented adverse or potentially adverse effects.

Since the early twentieth century, child protection reformers have increasingly relied on the judicial and law enforcement systems.²⁹³ From the juvenile courts terminating parental rights to state agencies enforcing mandatory reporting laws, child protection advocates have looked to the law for assistance.²⁹⁴ Following "rehabilitative" ideals of the 1970s, the 1980s brought a growing "retribution movement" in the area of child protection; and with that came increased emphasis on prosecution and adversarial intervention.²⁹⁵

²⁹²See *supra* notes 204-224 and accompanying text. (section entitled *Child Neglect Is Not a Nebulous and Insignificant Problem*).

²⁹³See Myers, *supra* note 46.

²⁹⁴*Id.* at 149.

²⁹⁵*Id.*

Even if prosecution never occurs, the ability to charge the offender is an option that most child protection advocates favor. The presence of legal authority, mandates, and potential intervention, are "sometimes necessary to disturb the dysfunctional family balance and mobilize the neglectful parent to change neglectful practices."²⁹⁶ Threat of legal action is sometimes necessary to obtain cooperation and "to overcome the initial denial and apathy of the neglectful parent."²⁹⁷

Both the civil protective laws and the criminal statutes relating to child neglect are directed at two common goals: "to protect the child from harm by deterring or reforming misconduct, and to express community outrage at parental misconduct."²⁹⁸ Criminal statutes operate as a "system of moral education and socialization. The Criminal law is obeyed not simply because of the legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance."²⁹⁹ In any case, both civil and criminal statutes represent societal and legislative recognition of the victimization of children.

a. *This Is Not a Victimless Crime: Effects On the Child*--State legislatures, like society, have come to recognize that child neglect adversely affects children. Numerous studies

²⁹⁶Gaudin, *supra* note 5, at 72.

²⁹⁷*Id.*

²⁹⁸IJA-ABA STANDARDS, *supra* note 20, at 180.

²⁹⁹John C. Coffee, Jr., *Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193 (1991) (footnote omitted).

indicate that child neglect (deprivation of necessary food, shelter, clothing, medical care, education, and supervision education), depending on the child's stage of development, will cause adverse physical, intellectual, and social and behavioral (including psychological adjustment) effects.³⁰⁰ Deprivation of necessities from a child, can result in malnutrition, illness, and death. Furthermore, neglect, or deprivation of necessities, will affect children differently, depending on the child's needs for development at the time, and what the parent fails to provide. Typically, children who are victims of neglect may risk injury, become insecure, develop poor self-images, and become withdrawn or very disruptive.³⁰¹

Research supports the finding that infants are especially vulnerable and child neglect adversely impacts the complete physical well-being of the child, especially during infancy.³⁰² Infants need more stimulation and parental care; "nutritional or psychosocial deprivation," may cause "failure to thrive" (FTT) syndrome,³⁰³ which eventually can cause death. FTT syndrome is "manifested by a significant growth delay with certain postural (poor muscle tone, unhappy facial expressions, persistence of

³⁰⁰Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUS. & BEHAV. 49, 49-62 (1993).

³⁰¹CHANNING L. BETE CO., WHAT EVERYONE SHOULD KNOW ABOUT CHILD NEGLECT 4-5 (1995).

³⁰²See Crouch, *supra* note 300, at 53.

³⁰³*Id.*

infantile postures) and behavioral signs (minimal smiling, decreased vocalizations, general unresponsiveness)."304

b. *Child Neglect Is Conduct "Prejudicial To the Good Order and Discipline of the Armed Forces"*--In addition to all the reasons for which legislatures have enacted criminal child neglect laws, the military has another reason to address child neglect. The military has an interest in maintaining a high level of morale, discipline, and readiness. Punitive sanctions--like the military justice system itself--promote justice and further discipline, readiness, and morale. "Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one."305

The DOD Family Advocacy Program illustrates that the armed forces recognize the adverse impact family problems have on "personnel and mission readiness, retention and overall quality of life."306 However, military family advocacy programs minimally affect unit command and control and force readiness and discipline.

In the armed forces, punitive sanctions not only serve as retribution, but also are vital to preventing recurrence and putting service members on notice as to responsible standards of

304 *Id.*

305 *Parker v. Levy*, 417 U.S. 748, 752 (1974).

306 DOD Fact Sheet, *supra* note 16.

parenting. "The armed forces have long recognized that the object of any criminal law is not alone to punish the offender or wreak revenge upon him for the harm he has done but to provide such a penalty as will deter or discourage others from committing the acts prohibited."³⁰⁷

Unlike civilian occupations, military service requires "a higher standard of duty, obedience and discipline"³⁰⁸ and a service member's "privacy and freedom must be restricted to some extent."³⁰⁹ Discipline is necessary in peacetime "to make the most of our training" and "to perform our assignments . . . efficiently, to carry out our occupation responsibilities."³¹⁰ "Military discipline does not necessarily mean punishment . . . it is the state of order and obedience among military personnel resulting from harmony. It pervades the life of a serviceman from courtesies of daily association to the assault on the battlefield. *It wins battles.*"³¹¹

The military services recognize the impact families have on unit readiness and discipline. Laws, regulations, and programs, such as government family housing, living and travel allowances, and medical, legal, child care, abuse prevention, and morale, welfare, and recreation services reflect the military's interest

³⁰⁷MORRIS O. EDWARDS & CHARLES L. DECKER, *THE SERVICEMAN AND THE LAW* 23 (6th ed. 1951).

³⁰⁸*Id.* at 4.

³⁰⁹*Id.*

³¹⁰*Id.* at 11.

³¹¹*Id.* at 136.

in the welfare of soldiers and their families.³¹² Also, as part of deployment preparation, military services require single parent service members and dual military couples with dependent family members to submit family care plans³¹³ that identify who will take custody of dependents. Care and supervision of children while service members are "deployed, TDY, or otherwise not available," significantly affect "mission, readiness, and deployability needs."³¹⁴

In further recognition of the family's impact on readiness the Army established the Total Army Family Program³¹⁵ to address quality of life issues. The program reflects the high value that the Army places "on both military and personal preparedness" and that "[c]ommanders have an obligation to provide assistance to establish and maintain personal and family affairs readiness."³¹⁶

The Army also has promulgated punitive regulatory provisions requiring soldiers to provide financial support for their families.³¹⁷ The Army's policy recognizes that because of the military's transient nature, a uniform standard is needed in the area of financial family support.³¹⁸ The Army recognizes that a

³¹²DEP'T OF ARMY REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, (1 Nov. 1994), para. 1-5a [hereinafter AR 608-99].

³¹³See AR 600-20, *supra* note 188, para. 5-5 (30 March 1988) (IO2, 1 Apr. 1992).

³¹⁴*Id.*

³¹⁵*Id.* para. 5-10 (IO2, 1 Apr. 1992).

³¹⁶*Id.* para. 5-10 (IO2, 1 Apr. 1992).

³¹⁷See AR 608-99, *supra* note 312, paras. 2-5, 2-9.

³¹⁸*Id.* para. 1-5c.

soldier's failure to support family members not only affects readiness, morale, and discipline, but also may be service discrediting.³¹⁹

Child neglect, like all family problems, "disrupts families, drains scarce resources, and reduces the readiness capability of involved military members."³²⁰ Commanders begin to monitor this with family care plans, especially crucial for deployable soldiers.³²¹ Child neglect adversely affects unit morale, welfare, and discipline. Moreover, the military family's health, welfare, and morale have a direct impact on the service member's ability to perform assigned duties.³²² Child neglect is "incompatible with the high standards of professional and personal discipline required"³²³ of service members.

To maintain discipline the military, like most states, needs a standard for criminal child neglect, in addition to child protection laws and agencies, such as family advocacy programs. When the case of a first-time offender (who deserves punishment) occurs, the military "cannot divert its efforts from the main task of training the many to the task of reforming the few."³²⁴ Without uniform guidance and punitive options in the area of

³¹⁹*Id.* para. 1-5d.

³²⁰Fact Sheet, Dep't of Air Force, subject: Air Force Family Advocacy Program (1994) [hereinafter Air Force Fact Sheet].

³²¹See AR 600-20, *supra* note 188, para. 5-5 (30 March 1988) (IO2, 1 Apr. 1992).

³²²Air Force Fact Sheet, *supra* note 320.

³²³MCO 1752.3A, *supra* note 68, para. 4a.

³²⁴EDWARDS, *supra* note 307, at 23.

parental responsibility, service members do not have notice of the requirements and commanders cannot maintain readiness and discipline.

2. State Criminal Child Neglect Statutes Compared--

Depending on their duty assignment in any of the fifty states or the District of Columbia, service members are subject to various laws defining neglect, both for criminal sanctions and the civil termination of parental rights.³²⁵ The District of Columbia and forty-four states have promulgated criminal child neglect statutes. Six states remain without any criminal legislation for child neglect.³²⁶ Most states criminalize conduct pertaining to a parent or caretaker's failure to provide a child's basic necessities.

³²⁵State civil rules describe child neglect as a basis for state actions such as, initiating child protective services, establishing reporting requirements for professionals, and terminating parental rights. The civil laws are inconsistent from jurisdiction to jurisdiction and the grounds for a determination of neglect vary widely. McGovern, *supra* note 17, at 207 (an extensive and thorough review of the civil state statutes). Within the civil statutes

[t]he definition of neglect changes from state to state. What may be defined as *neglected child* in West Virginia may be *abuse* in Colorado, *harm* in Oklahoma, *deprived child* in North Dakota, or none of the above in Massachusetts. These civil statutes determine the grounds for state intervention for child's removal from the home, termination of parental rights, and mandatory child abuse and neglect reporting requirements.

Id. at 214.

³²⁶As of 1 January 1994, the following states did not have criminal statutes for neglect offenses: Maryland, Michigan, North Dakota, South Dakota, Washington, and West Virginia.

Overall, jurisdictions vary widely in defining child neglect offenses. Chart 1 reflects the diverse statutory provisions denoting the criminal conduct of child neglect. State criminal provisions for this conduct are as diverse as their definitions of the terminology within the provisions.

State statutes all focus on the conduct of parents, guardians, caretakers, and other persons in loco parentis. However, the statutes do not use the same definition when defining who the statute is protecting. For example, one major difference between all state criminal child neglect statutes is the definition for the term "child" in each jurisdiction.³²⁷ Some states even define the term "child" with different age requirements within different child neglect statutes.³²⁸

State criminal codes further differ in focus. Some states focus on subjective parental responsibilities and omissions

³²⁷The ages in the state criminal statutes range from under six years old to under eighteen years of age or under twenty one years of age if the child is mentally or physically handicapped. The DOD defines a child as "a person under 18 years of age for whom a parent, guardian, foster parent, caretaker, employee of a residential facility, or any staff person providing out-of-home care is legally responsible. The term 'child' means natural child, adopted child, stepchild, foster child, or ward. The term also includes an individual of any age who is incapable for self-support because of a mental or physical incapacity." DOD DIR. 6400.1, *supra* note 15, at encl. 2, para. 3.

³²⁸See ALASKA STAT. § 11.51.100 (1994) (a child abandonment statute requiring that the child be under 10 years of age); ALASKA STAT. § 11.51.120 (1994) (criminal nonsupport statute requiring that the child be under 18 years of age).

("subjective statutes"), while others focus on the consequences of the parent's failure to act ("consequential statutes").³²⁹

The "subjective" statutes focus on the mens rea, the mental state of the accused, to determine blameworthiness; a parent who "knowingly fails to provide"³³⁰ or who "willfully omits, without lawful excuse, to perform any duty imposed by law to furnish necessary food, clothing, shelter, monetary child support, or medical attendance."³³¹

The "consequential" statutes center on the effects on the child. Such statutes include phrases such as, "under circumstances creating substantial risk of physical injury" or "deprivation harms or is likely to substantially harm the child's physical, mental or emotional health"³³² or neglects "a child so it adversely affects the child's health and welfare."³³³

³²⁹Major William Barto, Instructor, Criminal Law Division, The Judge Advocate General's School, Charlottesville, VA, provided the titles for these classifications. "Consequential" statutes are also known as "result-oriented" crimes. See Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 548 (1988).

³³⁰See Mo. ANN. STAT. § 568.040 (Vernon 1994) (criminal nonsupport statute providing "a person commits the crime of nonsupport if he knowingly fails to provide") *Id.*

³³¹OKLA. STAT. ANN. TIT. 21, § 852 (West 1995).

³³²See MINN. STAT. ANN. § 609.378 (West 1995). This statute combines consequential and subjective, by requiring that the defendant "willfully deprive." *Id.* See also, ARK. CODE ANN. § 5-27-204 (Michie 1994) (a consequential statute, prohibiting "conduct creating a substantial risk of serious harm to the physical or mental welfare").

³³³TENN. CODE ANN. § 39-15-401 (1994).

Some states combine "subjective" and "consequential" statutes into one criminal offense. For example, in Ohio, parents commit child endangerment if they "create a substantial risk to health or safety of a child by violating a duty of care, protection or support."³³⁴

State criminal codes for child neglect can be further classified into the following categories: Child Endangerment, Child Abandonment; Criminal Nonsupport or Deprivation; Child Abuse (combined statutes); Failure to Take Action to Prevent Abuse; and Miscellaneous. States may have statutes from some or all six groups. Within the groups, the statutes remain "subjective" or "consequential" or a combination. Whatever the categories, no two state criminal statutory systems prohibiting child neglect are identical. State criminal child neglect laws are not consistent, not precise, and because of the diversity, do not notify the service member of potential prosecution.

The focus of criminal child neglect statutes properly should be different in each type of statute; a model statute would include a provision for child endangerment, child abandonment, and criminal nonsupport or deprivation. The provisions should not focus on actual harm to the child, but on the likelihood of adverse impact on the child.

³³⁴OHIO REV. CODE ANN. § 2919.22 (Anderson 1993); 1994 Ohio Legis. Bull. 162 (Anderson). See also HAW. REV. STAT. ANN. § 709-904 (Michie 1994).

a. *Child Endangerment*--Within the Child Endangerment grouping, state criminal child neglect statutes tend to focus on whether the parent placed the child in some danger. Some states prohibit a parent from: "knowingly causing or permitting" or "knowingly engaging in conduct causing" the child to be endangered, or creating a "substantial risk of some harm." However, these statutes use various mens rea requirements, along with different descriptive language to define what must be endangered (such as injury to health, moral welfare to be imperiled, life or limb to be endangered).

For example, in Arkansas, endangerment prohibits one from knowingly engaging in conduct creating a substantial risk of serious harm to the physical welfare of a known minor.³³⁵ In Indiana, a person who knowingly or intentionally places their dependent in a situation that may endanger life or health commits an offense.³³⁶ Maine uses a completely different approach to child endangerment; in that state, a person is guilty of endangering the welfare of a child if the person recklessly endangers health, safety or welfare of a child, by violating a duty of care or protection.³³⁷

³³⁵ARK. CODE ANN. §§ 5-27-203, 5-27-204 (Michie 1994).

³³⁶IND. CODE ANN. § 35-46-1-4 (West 1995).

³³⁷ME. REV. STAT. ANN. TIT. 17-A, § 554 (West 1994).

Also, in some states, a parent commits endangerment even if another person commits the act. In Alabama, a parent who *directs or authorizes* a child "to engage in an occupation involving substantial risk of danger to life or health" commits an offense.³³⁸ Under Arizona law, a parent is prohibited from knowingly *causing or permitting* a child's life to be endangered, health to be injured, or moral welfare to be imperiled, by neglect, abuse or immoral associations.³³⁹ In Hawaii, a parent who intentionally, knowingly or recklessly *allows another* to inflict serious injury or substantial bodily injury on a child commits child neglect in the form of endangerment.³⁴⁰

Statutes classified under the Child Endangerment category are generally designed to punish parents who place their children in perilous situations. The basic objective underlying the statutes in California and Virginia appear to best suit this type of child neglect.³⁴¹ That is, a parent commits neglect (i.e., child endangerment) by placing a child in a situation that has the potential to harm or injure the child. Ideally, a model

³³⁸ALA. CODE § 13A-13-6 (1994).

³³⁹ARIZ. REV. STAT. ANN. § 13-3619 (West 1994).

³⁴⁰HAW. REV. STAT. §§ 709-903.5, 709-904 (Michie 1994).

³⁴¹See CAL. PENAL CODE § 273a(b) (West 1995) (prohibiting willfully causing or permitting a child to be "placed in a situation that its person or health is endangered"); VA. CODE ANN. § 40.1-103 (Michie 1994) (prohibiting willfully or negligently causing or permitting a child's life to be endangered or child's health to be injured, or willfully or negligently causing or permitting a child to be placed in a situation that endangers life, health, or morals).

child endangerment statute would combine specific language from both California and Virginia statutes.

Specifically, a model child endangerment statute should state "willfully, negligently, or recklessly cause or permit the person or health of the child to be injured, or to be placed in a situation that its person or health is endangered or is likely to be endangered." Such a statute combines California's phrase "causes or permits the person or health of the child to be injured, or willfully causes or permits that child to be placed in a situation that its person or health is endangered,"³⁴² with Virginia's lower criminal state of mind requirement, "willfully or negligently" cause or permit.³⁴³

The combination of elements creates a viable child endangerment statute. Parents would be criminally liable for negligently placing their children in perilous situations where the child's person or health is injured, endangered, or is likely to be endangered. Therefore, parents may be criminally liable for conduct that results in potential harm to the child.

b. Child Abandonment Statutes--This category highlights the inconsistency and lack of uniformity among criminal child neglect statutes. In this type, several states have enacted statutes criminalizing a parent's failure to

³⁴²See CAL. PENAL CODE § 273a (West 1995).

³⁴³See VA. CODE ANN. § 40.1-103 (Michie 1994).

supervise their child. Typically, abandonment statutes create a criminal offense for a parent to "desert" a child "with intent to abandon"³⁴⁴ or to "wholly abandon"³⁴⁵ or "to willfully and voluntarily physically abandon with the intention of severing all parental or custodial duties or responsibilities."³⁴⁶

Other states make it unlawful to "leave a child unattended to his own care" when "the defendant did not intend to return or provide adult supervision."³⁴⁷ Still others make it unlawful to "abscond"³⁴⁸ or "falsely leave a child to an orphanage"³⁴⁹ or "fail to care for and keep the child so the public is forced to maintain the child."

Some states have other unique provisions within the Child Abandonment category;³⁵⁰ Texas, for example which prohibits "intentionally or knowingly leaving a child under seven years of

³⁴⁴See CAL. PENAL CODE § 271 (West 1995); HAW. REV. STAT. § 709-902 (Michie 1994).

³⁴⁵See ALA. CODE § 13 A-13-5 (1994).

³⁴⁶GA. CODE ANN. § 16-5-72 (1994).

³⁴⁷See LA. REV. STAT. ANN. § 14:79.1 (West 1995).

³⁴⁸See MASS. GEN. LAWS ANN. ch. 119, § 39 (West 1995) (prohibiting a parent who makes a contract for a child's board and maintenance, but absconds commits abandonment).

³⁴⁹See CAL. PENAL CODE § 271a (West 1995).

³⁵⁰D.C. CODE § 22-901 (1973), originally enacted in 1885, until August 1994 when it was repealed criminalized the "disposing" of a child "with a view to its being employed as an acrobat, or a gymnast, or a contortionist, or a circus rider, or a rope-walker, or in any exhibition of like dangerous character, or as a beggar, or mendicant, or pauper, or street singer, or street musician". Today D.C. CODE § 22-901 (1994) prohibits torturing, beating, or willfully maltreating a child, or injurious conduct. *Id.*

age, in a motor vehicle for longer than five minutes unattended by someone fourteen years old or over."³⁵¹

Within this category, Illinois has enacted the most notable abandonment statute. The Illinois statute states that child abandonment is committed when a parent, without regard for the mental or physical health, safety or welfare of that child, knowingly leaves the child who is under the age of thirteen without supervision by a responsible person over the age of fourteen for twenty-four hours or more.³⁵² The statute lists factors the trier of fact must consider in determining whether the defendant committed the offense without regard for the mental or physical health, safety or welfare of the child. Factors listed include: the child's age; location where the child was left; the child's special needs; how far away the parent was; whether the child was restricted in any way (locked in); whether food, provisions, and emergency phone numbers were left; and other related factors.³⁵³

Although the Illinois statute requires that the parent leave the child unsupervised for at least twenty-four hours, the statutory language is the most comprehensive. The Illinois statute provides for the trier of fact to review all the facts in each case and allows for a case by case determination of an

³⁵¹See TEX. PENAL CODE ANN. § 22.10 (West 1994).

³⁵²720 ILL. ANN. STAT. ch 720, § 5/12-21.5 (1994).

³⁵³720 ILL. ANN. STAT. ch 720 § 5/12-21.5 (1994).

offense. Other states, which require intent to permanently abandon the child, fail to address a large majority of the "home alone" offenses occurring throughout the country. In addition, those states are disregarding the potential harm that may occur and the emotional harm a child who is left alone for a finite period may suffer.

c. *Criminal Nonsupport or Deprivation Statutes*--Within this category, states consistently provide a criminal offense for parental failures to provide necessities. States require "a failure to provide" or that the defendant "willfully or negligently deprived or allowed to be deprived" or "willfully omits." The differences among the statutes are: what the parent must provide; whether the states take into account the defendant's ability to provide; and whether harm must result from the nonsupport or deprivation.

Most state statutes in the Nonsupport or Deprivation category identify the offense with a failure to provide necessary food, shelter, clothing.³⁵⁴ Other states add "medical or health care"³⁵⁵ or "education as required by law"³⁵⁶ or "supervision."³⁵⁷ Many include financial support in the definition of support.

³⁵⁴See CONN. GEN. STAT. ANN. § 53-20 (West 1995); D.C. CODE ANN. § 22-902 (1994).

³⁵⁵See ALASKA STAT. § 11.51.120 (1994); CAL. PENAL CODE § 270 (West 1995); MINN. STAT. ANN. § 609.378 (West 1995); MO. ANN. STAT. § 568.040 (Vernon 1994).

³⁵⁶See ALASKA STAT. § 11.51.120 (1994); IND. CODE ANN. § 35-46-1-4 (West 1995); N.J. STAT. ANN. § 9:6-1 (West 1995).

³⁵⁷See MINN. STAT. ANN. § 609.378 (West 1995).

Some include phrases exempting individuals who are unable to provide. To allow for inability, statutes include the following: "which he can provide"³⁵⁸ or "without lawful excuse"³⁵⁹ or "is able by means of property or capacity for labor."³⁶⁰ Including these phrases keeps the impoverished out of the realm of possible offenders. Lastly, some statutes add a requirement of "likely to substantially harm"³⁶¹ or "persistently fails,"³⁶² criminalizing only egregious failures to provide for children.

To gain the benefits of all those categorized in the Criminal Nonsupport or Deprivation group, a model statute must provide for the failure to provide food, care, clothing, shelter, medical attention, and education. However, phrases such as "without lawful excuse," that allow defendants to "quibble," should be deleted. However, the words, "negligently deprive or allow a child to be deprived of"³⁶³ should be included. Ideally, the statute should prohibit willful or negligent (or allowing) deprivation of a child of necessary food, clothing, shelter, medical attention, and education.

The remaining three categories are small groups of statutes that few states have enacted. Statutes within the Failure to Take Action to Prevent Abuse category criminalize the failure to

³⁵⁸See HAW. REV. STAT. § 709-903 (Michie 1994).

³⁵⁹See ALASKA STAT. § 11.51.120 (1994).

³⁶⁰See ME. REV. STAT. ANN. tit. 17-A, § 552 (West 1994).

³⁶¹See MINN. REV. STAT. § 609.378 (West 1995).

³⁶²See HAW. REV. STAT. § 709-903 (Michie 1994).

³⁶³See FLA STAT. ANN. § 827.05 (West 1995).

act. The Child Abuse Combined Statutes combine child neglect into the definition of abuse. The Miscellaneous category is comprised of statutes that prohibit exposing children to hazards or dangers; or cruelty; or some other specific state offense. Chart 1 clarifies each category and indicates which jurisdictions have enacted statutes in what categories.

Because there are so many diverse state statutes enforced across the country, defining the crime of child neglect and notifying the military member are even more difficult. Due to the lack of uniformity among states and the lack of a uniform, national standard to determine when a child is neglected, it is difficult to understand what actions or omissions constitute neglect.³⁶⁴ The military should subject service members to the same requirements for parental responsibilities in each jurisdiction.

3. *Are Criminal Child Neglect Statutes Void for Vagueness?*-Although the statutory language of the criminal child neglect statutes appears vague or ambiguous to the lay reader, they withstand the constitutional challenge of "void-for-vagueness." After reviewing some cases involving "void-for-vagueness challenges," two reasons why courts uphold the statutes become apparent. First, states appear to constantly change criminal child neglect statutes. Once a statutory term or phrase is

³⁶⁴McGovern, *supra* note 17, at 214.

successfully challenged as "vague," the legislature amends the criminal statute to either remove or change the terms or phrases.

Secondly, courts usually find that these statutes are not void for vagueness based on the facts of each case. Prosecutors primarily enforce criminal child neglect statutes against parents who grossly neglect their children and involve the most egregious circumstances. Hence, reported opinions of statutes withstanding constitutional challenges involve a defendant's conduct that was clearly criminal. Judges are able to find that the defendant "knew" such conduct was criminal.

a. *The Supreme Court's Void for Vagueness Standard--*

The basis for the constitutional challenge of "void-for-vagueness" is the Supreme Court standard that the Due Process Clause of the Fourteenth Amendment prohibits prosecution under vague statutes. Vague statutes do not clearly define the illegal conduct and fail to provide fair warning or either constructive or actual notice; and as a result, may promote "arbitrary enforcement."³⁶⁵ Such laws may not warn the innocent, and they impermissibly delegate policy matters "to policemen, judges, and juries" to resolve in a subjective, ad hoc manner.³⁶⁶

³⁶⁵J. Nelson Thomas, *Prosecuting Religious Parents for Homicide: Compounding a Tragedy?*, 1 VA J. Soc. POL'Y & THE LAW 383, 432 (1994). See also, Scheiderer, *supra* note 281, at 1441.

³⁶⁶*Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The Court did note, however, that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.*

To avoid vagueness, as the Supreme Court explained in 1926, in *Connally v. General Const. Co.*,³⁶⁷ a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."³⁶⁸ Furthermore, "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."³⁶⁹

The United States Supreme Court has stated that the standard in deciding vagueness challenges is whether the statute or ordinance: (1) gives a person of ordinary intelligence fair notice that their future conduct is prohibited; and (2) whether it "encourages arbitrary and erratic arrests and convictions."³⁷⁰ A law is vague "if its prohibitions are not clearly defined."³⁷¹

Courts must review criminal statutes more closely because "when a statute imposes criminal penalties or burdens constitutionally protected rights, a heightened requirement of fair warning applies."³⁷² A criminal law must define the offense

³⁶⁷*Connally v. General Const. Co.*, 269 U.S. 385 (1926).

³⁶⁸*Id.* at 391.

³⁶⁹*Id.*

³⁷⁰*Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

³⁷¹*Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

³⁷²*Clark, supra* note 253, at 584 (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982)).

"with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."³⁷³

Although actual notice to citizens is important, the more important aspect of the vagueness doctrine is that the "legislature establish minimal guidelines to govern law enforcement."³⁷⁴ As the Court has stressed, legislation must meet "constitutional standards for definiteness and clarity."

In 1988, the Court made it more likely that criminal child neglect statutes would withstand constitutional challenges. Specifically, in *Maynard v. Cartwright*,³⁷⁵ the Court said:

Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts at hand; the statute is judged on an as-applied basis.³⁷⁶

³⁷³*Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

³⁷⁴*Kolender*, 486 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

³⁷⁵486 U.S. 356 (1988).

³⁷⁶*Id.* at 361 (citations omitted).

Accordingly, when claiming a criminal child neglect statute is void for vagueness, a "defendant cannot rely on hypothetical situations at the periphery of the statute in asserting his vagueness challenge, but must instead demonstrate that he was unable to determine from a reading" of the statute "that his conduct was prohibited."³⁷⁷ In light of the egregious facts of criminally charged child neglect cases, most defendants find this standard very difficult to meet.

b. Criminal Child Neglect Statutes Withstand Challenge--With the Supreme Court's standard, lower courts have found that all categories of criminal child neglect statutes have passed constitutional muster. In rare cases when a court finds a phrase void for vagueness, the state legislature usually amends the statute. Additionally, state courts look to other state courts and use those opinions to guide their findings of constitutionality.

State courts have repeatedly upheld the Child Endangerment category of criminal child neglect statutes as constitutional. As early as 1965, laws prohibiting "willfully causing or permitting a child to be placed in such a position that its life or limb may be endangered or its health likely to be injured," have been upheld. Courts find that endangerment statutes seek to

³⁷⁷State v. Butterfield, 874 P.2d 1339, 1343 (Or. Ct. App. 1994) (defendant failed to obtain "necessary and proper medical care for injured child, statute held not void for vagueness).

reach conduct that "defies precise definition" and that the various kinds of situations "where a child's life or health may be imperiled are infinite" and although the statutory language may be broad and "the prohibited behavior is very general, this seems necessary in the nature of the subject matter."³⁷⁸

In more recent cases, this type of statute was held constitutional based on a "common sense test" or "rule of reason." With a statute prohibiting "willfully unreasonably causing or permitting a child. . . to be placed in a situation in which its life, body or health may be injured or endangered," the Supreme Court of Kansas held that the statute was designed "to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common sense interpretation, [was] not vague."³⁷⁹

³⁷⁸People v. Beaugez, 43 Cal Rptr. 28, 32-33 (Cal. Dist. Ct. App. 1965).

³⁷⁹State v. Fisher, 631 P.2d 239, 240 (Kan. 1981) (holding that the term "unreasonably" as applied in the statute was "the doing or the omitting of some action contrary to reason, the doing of or omitting to do something that the average person, possessing ordinary mental faculties, would not have done or would not have omitted under all the attendant and known circumstances."). *Id.* at 241-242. The Court held the term "may" to mean "something more than a faint or remote possibility; . . . a reasonable probability, a likelihood that harm to the child will result." *Id.* at 242; see also, State v. Hoehl, 568 P.2d 484 (Colo. 1977) (holding that a statute stating "knowingly, intentionally, or negligently, and without justifiable excuse, causes or permits a child to be placed in a situation that may endanger the child's life or health," was not void for vagueness; the term "may" meant reasonable probability, and "without justifiable excuse" referred to a specific statute on justification).

The Court of Appeals of New Mexico upheld a similar statute as not unconstitutionally vague because the statute did not apply to ordinary situations when a child is injured, but only to abuse, and "not mere normal parental action or inaction."³⁸⁰

The second category of criminal child neglect, Child Abandonment statutes, generally includes the oldest laws of child neglect; legislatures have "perfected" crimes identifying abandonment. Child abandonment statutes are more clear and are challenged less. As one court stated, "Leaving children of tender years, completely dependent upon those in whose care they are entrusted, pathetically vulnerable to any danger that could foreseeably materialize, is the type of conduct that would cause the most callous to find reprehensible."³⁸¹

³⁸⁰State v. Coe, 587 P.2d 973, 974 (N.M. Ct. App. 1978) (statute defining abuse to include "a person knowingly, intentionally, or negligently, and without justifiable cause, causing or permitting a child to be placed in a situation that may endanger the child's life or health."). *Id.*

³⁸¹Commonwealth v. Skufca, 321 A.2d 889, 893 (Pa. 1974). Also, abandonment statutes usually include: a required mens rea of "intent to sever parental duties;" or a requirement of "leaving a child under a specific age unattended in a situation likely to endanger health and welfare;" or a phrase addressing the creating of a substantial risk of physical injury. Therefore, courts find that abandonment statutes are not void for vagueness. See *id.* (abandonment statute included leaving child under age sixteen, abandoned in destitute circumstances or a parent's willful failure to supply necessary and proper food, clothing or shelter for such child. Defendant left a three year old and a ten month old child unattended with the doors jammed. The children died in fire because neighbor could not get them out. Court held statute was not void for vagueness.); see also, State v. Rosen, 589 P.2d 1132 (Or. Ct. App. 1979) (holding that a defendant could only be charged under child neglect not criminal nonsupport. Defendant left her three month old daughter in a car overnight while she got drunk and did not return for the child.

Courts also uphold statutes in the Criminal Nonsupport or Deprivation category. These statutes include criminalizing the refusal or neglect to provide support for a child; with support defined to include necessary and proper food, clothing, medical attention and education.³⁸² Courts uphold these statutes because "[p]arents have a legal obligation to provide for their minor children."³⁸³

Another area of "void-for-vagueness" challenges, involves statutes that include the phrase "by violating a duty of care, protection or support." On review, courts have upheld these criminal child neglect statutes. For example, in interpreting a statute prohibiting a parent from creating "a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support," the Supreme Court of Ohio found that the terms "substantial risk" and "duty of care, protection, or support," were not unconstitutionally vague.³⁸⁴ The court held

The child was found dead the next morning.) In addition, the type of clauses included in abandonment statutes, also appear in endangerment statutes and therefore, judicial opinions upholding endangerment also apply to the abandonment statutes.

³⁸²See *State v. Butterfield*, 874 P.2d 1339, 1343 (Or. Ct. App. 1994) (court upheld statute requiring "necessary and proper" care, not void for vagueness).

³⁸³*State v. Duggar*, 806 S.W. 2d 407, 408 (Mo. 1991) (holding statute prohibiting "knowing failure to provide, without good cause, adequate food, clothing, and lodging, for minor child," not unconstitutionally vague because of the term "minor").

³⁸⁴*State v. Sammons*, 391 N.E. 2d 713, 715 (Ohio 1979). The court considered this a "reasonable standard of duty of care and protection of one's children generally to be applied throughout the community." *Id.*

that "the norm in our society is for a parent to strive to see that his children are reasonably well nourished, housed, and clothed and reasonably protected from harm, and provided with necessary health care."³⁸⁵

Courts have also upheld criminal child neglect statutes based on the statute's "criminal negligence" standard. States give defendants fair notice that gross deviations "from the standard of care which a reasonable person would exercise in such a situation"³⁸⁶ trigger criminal liability.³⁸⁷

³⁸⁵*Id.* at 715. The defendant failed to stop tortuous branding of his children and failed to obtain medical treatment for the children. The court held that there was adequate notice of the standard of conduct the statute required; and found that "[a] man of 'common intelligence' would know that appellant's conduct presented a strong possibility of harm to the health or safety of appellant's children." *Id.*; see also *State v. Bachelder*, 565 A.2d 96, 97 (Me. 1989) In this case, the defendants unsuccessfully challenged a child endangerment statute that prohibited knowingly endangering a "child's health, safety or mental welfare by violating a duty of care or protection." *Id.* at 97. Charged with one count for each of her six children, for her failure to provide adequate supervision, food, clothing and shelter, the defendant allowed her three-year-old, eight-year-old and ten-year-old children to wander the streets alone; failed to feed, clothe, and bathe them; and allowed "their residence to become so dirty that it was unfit for habitation." *Id.* at 97. Although the statute did not define the duty, nor specify who had a duty, the court upheld the conviction, because the defendant was the natural mother, found her accountable, and the statute valid. Cases like this reflect a court's tendency to find a defendant owes a duty, based on the relationship to the child. See also *State v. Crossetti*, 628 A.2d 132 (Me 1993) (holding that aunt owed duty of care to fourteen year old niece living with her temporarily).

³⁸⁶*State v. Damofle*, 750 P.2d 518 (Or. Ct. App. 1988) P.2d 521) (defendant charged with criminal mistreatment for violating a legal duty to provide care, with criminal negligence withholding necessary and adequate food, physical care or medical attention, court held the statute was constitutional.); see also

One consistent theme in cases involving egregious facts is that courts uphold the constitutionality of the criminal child neglect statute. Based on the Supreme Court's guidance in *Maynard v. Cartwright*, lower courts find that the standard of void for vagueness, as applied to their case, is clearly met. The defendant was on notice that the charged conduct, that was so reprehensible, was criminal.³⁸⁸ Courts find that child endangerment statutes are not vague as applied to the present case, and "the possibility of vagueness in peripheral situations need not be considered."³⁸⁹

Other courts have repeatedly followed this rationale in criminal child neglect cases. In one case involving a nine-year-old child locked in an unheated room; given very little food; and forced to live in very unsanitary conditions for several years, the court experiences no difficulty finding the conduct within

State v. Mills, 52 Or. App. 777, 629 P.2d 861 (Or. Ct. App. 1981).

³⁸⁷In cases where the statute requires a higher mens rea (knowingly or intentionally), courts infer the intent from the conduct itself. See State v. Crowdell, 487 N.W.2d 273 (Neb. 1992).

³⁸⁸See State v. Poehnelt, 722 P.2d 304 (Ariz. Ct. App. 1985) (a case where a nine-year-old child was found hog tied, gagged, emaciated--systematically starved for four or five years, severely underweight, and experiencing stunted growth, a court easily found the statute constitutional. The court stated, the "starving of a child . . . to the point of obvious gauntness and to such an extent that the stunted growth motivated appellants to conceal the child, is not a borderline case." *Id.* at 312).

³⁸⁹*Poehnelt*, 722 P.2d at 312.

the criminal statutory prohibition.³⁹⁰ In other cases, where the condition of the residence was so unsanitary, deplorable, and hazardous, courts have unhesitatingly upheld the statute's constitutionality.³⁹¹ In essence, the egregious facts determine the outcome of constitutional void-for-vagueness challenges. Accordingly, criminal child neglect statutes withstand scrutiny.

³⁹⁰State v. Crowdell, 487 N.W.2d. 273 (Neb. 1992).

"At trial, Jeff described the bathroom conditions he was forced to endure while confined in his room:

Q. Jeff, What would you do if you had to go to the bathroom, after you were put in the room?

A. Usually, I'd have to--Well, if I had to urinate, It'd go out my window. If I had to do otherwise, I'd usually go in my shirt or something.

Q. Okay. Would you ever try to let anybody know that you had to go to the bathroom ...[?]

A. Sometimes. I'd just knock on the floor, or knock on the door to be let out. But, sometimes they [the other children] weren't supposed to let me out and stuff.

Q. Would your parents let you out when you'd knock and say you had to go to the bathroom?

a. Sometimes."

Id. at 276.

³⁹¹See State v. Damofle, 750 P.2d 518 (Or. Ct. App. 1988) The court found criminal mistreatment statute constitutionally sufficient where defendants lived with their three children (five months, one and a half years, and five years old) in room made of plastic "in wood inside bar under unsanitary conditions." *Id.* Among other things, it was cold, wet, musty, stenching; they used a coffee can as the toilet and it was full of urine; crackers and formula were next to the urine; bags of garbage, clothing, dirty diapers, bags of dirty dishes, soured bottles of baby formula, and flies were everywhere. See also State v. Deskins, 731 P.2d 104 (Ariz. Ct. App., 1987).

IV. Possible Solutions: Providing Standards

Although they withstand scrutiny, state statutes remain inconsistent from jurisdiction to jurisdiction. To adequately address the problem of child neglect in the military community, the armed forces must eliminate inconsistencies and promote fairness. The best solution is a *uniform* family advocacy program, combined with *uniform criminal* standards and available criminal sanctions. However, this thesis does not focus on the family advocacy program, but rather on the lack of uniform standards and punitive options. The military could take many different approaches to correct the existing problems in the military's response to child neglect. To best address the problem of child neglect in the military community, any solution should provide consistent criminal standards for parental responsibilities. Because parental responsibilities do not change from service to service and location to location, the standards should not change. The armed forces, either through its own or congressional action, could produce consistent standards throughout the services. The discussion and analysis that follow address the three most viable corrective actions; recommended proposals for each are included as appendices.

Of the three possible actions, two require congressional legislative initiatives and one entails executive branch action.

The possible actions include: amending the UCMJ;³⁹² enacting a federal law criminalizing child neglect;³⁹³ and implementing executive branch initiatives, such as an executive order adding a UCMJ, Article 134 offense, or DOD or individual service punitive general order, directive, or regulation.³⁹⁴

Each proposal criminalizes child neglect by providing criminal sanctions for the three prevailing categories used throughout the states for criminal child neglect: child abandonment, child endangerment, and deprivation of necessities. Based on the status of potential offenders (military or civilian), the provisions differ slightly. Modeled after seven different state criminal child neglect statutes, the recommended statutory provisions focus on parental duties codified in state criminal child neglect statutes.³⁹⁵

The objective is to correct the conduct of both military members and civilian spouses. Individually, each potential

³⁹²See *infra* Appendix B and C providing the proposed amendment and implementing executive order.

³⁹³See *infra* Appendix D providing the proposed amendment to title 18 of the United States Code.

³⁹⁴See *infra* Appendix E for proposed DOD general order. Similarly, DOD could also include punitive provisions within a joint regulation. Such provisions would reflect the prohibitions in the proposed general order at Appendix E.

³⁹⁵The abandonment offense is modeled after 720 ILL. ANN. STAT. ch § 5/12-21.5 (Smith-Hurd 1994). The endangerment offense is modeled after VA. CODE ANN. § 40.1-103 (Michie 1994); CAL. PENAL CODE § 273a (1993). The criminal deprivation offense is modeled after ALASKA STAT. § 11.51.120 (1994), CAL. PENAL CODE § 270 (West 1995), FLA. STAT. ANN § 827.05 (West 1995), and MINN. STAT. § 609.378 (West 1995).

corrective action would not provide complete uniformity and criminal jurisdiction over all offenders present in the military community. Nevertheless, each would regulate parental responsibilities, an area now plagued with inconsistencies and ambiguities. To best understand each proposal and what inadequacies the proposal would rectify, the following discussion will review each in terms of "who, what, and where"--To whom will the law or general order apply? What offenses will it make criminal? and Where will it work?

A. A Proposed Amendment to Chapter 47 of Title 10 United States Code: A Proposed Punitive UCMJ Article

1. *What a New Punitive Article Will Accomplish*--The proposed amendment to the UCMJ (Appendix B) and proposed executive order (Appendix C) provide an entirely new punitive article. As the proposed amendment and implementing executive order reflect, the proposed offense is called "child neglect" and prohibits three types of misconduct: child abandonment, child endangerment, and criminal deprivation of a child (necessities and substandard environment). As an additional punitive article, the proposed charge would not require the government to prove an additional element of service discrediting conduct or conduct prejudicial to good order and discipline.

A new punitive article for child neglect would resolve two issues. First, it would establish clear guidelines for minimal

parental obligations for all service members. Secondly, it would provide criminal jurisdiction over service members assigned both in the United States and abroad for child neglect.

Service members already are held criminally liable under the UCMJ for similar negligent or reckless acts or omissions (i.e., property, etc.). This new article would merely expand criminal liability to harmful and egregious parental commissions and omissions. A punitive article clearly would notify service members that this conduct is criminal. Moreover, soldiers would be criminally responsible for their willful, negligent, and reckless conduct toward their children. Several punitive UCMJ articles already punish service members for neglect,³⁹⁶ or acting negligently³⁹⁷ or recklessly.³⁹⁸ Comprehensive definitions for

³⁹⁶UCMJ art. 87 (1984). In missing movement through neglect, neglect is defined as "the omission to take such measures as are appropriate under circumstances to assure presence." *Id.*

³⁹⁷UCMJ art. 92 (1984). In dereliction of duty through neglect, negligently is defined as "an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *Id.*; See also UCMJ art. 110 (1984). In improper hazarding of a vessel, negligence is defined as "the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances." *Id.*

³⁹⁸UCMJ art. 111 (1984). In reckless driving, reckless means when the vehicle "exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. . . . whether, under all the circumstances, the accused's manner . . . was of that heedless nature which made it actually or imminently dangerous." *Id.*

those terms already appear throughout the UCMJ and *Department of the Army Pamphlet 27-9, Military Judges' Benchbook*.³⁹⁹

As the proposed executive order reflects, the new offense would prohibit abandonment, endangerment, and deprivation. The common types of parental omissions would fall within the scope of the new article. The new offense would provide uniform criminal standards for supervision of minors. The proposed offense of abandonment would prohibit failures to supervise and deprivation of necessities, areas commonly regulated by numerous, inconsistent installation regulations.⁴⁰⁰ Service members who fail to obtain medical treatment for their children after the child suffered injuries from abuse would face criminal liability (endangerment). Also, service members who place their children with a caretaker known to abuse children would be criminally liable under the child neglect article (endangerment).

³⁹⁹DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, (1 May 1982) [hereinafter BENCHBOOK] The definitions in the proposed executive order (Appendix C) and DOD general order (Appendix E) for terms "willfully," "negligence," "reckless," and "suffer" appear in different parts of the BENCHBOOK. The definitions in Appendix C reflect BENCHBOOK, para. 3-70 (willfully & negligence); para. 3-75 n.13 (update 28 Feb. 1994) (reckless). The same or similar definition for these terms appears throughout the UCMJ. The definition for "knowledge" that appears in Appendix C reflects the definition used in UCMJ art. 91 (1984).

⁴⁰⁰See *supra* note 192-198 and accompanying text (section entitled *Empirical Data: Problems Identified Through an Army Survey*); see also *infra* Appendix A, Army Staff Judge Advocate Questionnaire: Summary of Responses.

More expansive--as compared to the proposed amendment to Title 18, United States Code--the proposed UCMJ article includes an additional type of offense within the criminal deprivation category. Because a number of military cases involve service members who willfully allowed their children to live in very substandard living conditions,⁴⁰¹ an offense for an unhealthy, substandard environment is included. The offense only applies in cases where the child's health is significantly impaired as a result or is in danger of being significantly impaired. To maintain our "honorable military service," and "its necessarily high standards of conduct"⁴⁰² this offense is more expansive than the proposed Title 18 amendment.

As part of the UCMJ, a new punitive article would provide criminal sanctions and uniform standards for all military offenders both inside and outside the United States. Wherever the crime occurs, the existence of a punitive article would allow military investigators to investigate allegations of the crime of neglect for all allegations on post, and cases involving service members off post. Without a military offense, military investigators frequently will not investigate.

The proposed article includes enhanced punishment for specific offenses. Similar to UCMJ, Article 128 (Assault), this proposed punitive article provides increased punishments based on

⁴⁰¹See *id.*

⁴⁰²EDWARDS, *supra* note 308, at 22.

the proof of actual harm. However, some conduct causing potential harm also may fall within the scope of this proposed offense.

2. *What a New Punitive Article Will Not Accomplish*--An action such as this legislative proposal will only extend criminal jurisdiction to service members. Such legislation will not give the military criminal jurisdiction over civilians for child neglect. The military's sole approach to civilians would be voluntary participation in family advocacy programs and limited administrative actions.

*B. A Proposed Amendment to Title 18 of the United States Code:
The Child Neglect Act of 1996*

The proposed amendment to Title 18 (Appendix D), like the proposed UCMJ offense, provides criminal sanctions for child abandonment, child endangerment, and criminal deprivation (of necessities only).

1. *What an Amendment to Title 18 United States Code Will Accomplish*--This proposed amendment would provide criminal jurisdiction, over both military and civilian offenders, for child neglect occurring in the "special maritime and territorial jurisdiction" of the United States--that is, federal concurrent or exclusive jurisdiction. This is the only method to gain criminal jurisdiction over civilians. However, based on the

current definition of "special maritime and territorial jurisdiction," criminal jurisdiction would not extend to offenses that civilians commit abroad. Therefore, an amendment would not provide jurisdiction over civilian offenders in foreign countries.

As the United States Supreme Court has stated, to extend criminal jurisdiction of crimes against individuals to outside the United States, Congress must expressly state that intent within the amendment to Title 18.⁴⁰³ In the alternative, Congress could pass legislation providing jurisdiction over civilians accompanying the forces or expand federal court jurisdiction.⁴⁰⁴

In any case, an amendment to Title 18 that provides a federal offense for child neglect will "pull" civilians into federal jurisdiction for on-post offenses. As a result, as part of prosecution, the military could require civilians to participate in the family advocacy program.

Apparently, some members of Congress agree that a need exists for a federal criminal child endangerment and abuse statute. In 1993, congressional representatives introduced the Child Endangerment and Abuse Act; a bill "to amend Title 18 United States Code to provide penalties for child endangerment

⁴⁰³United States v. Bowman, 260 U.S. 94, 98 (1922).

⁴⁰⁴Since this is not an offense against the United States, the proposed amendment does not include congressional intent to apply overseas.

and abuse in the special maritime and territorial jurisdiction of the United States."⁴⁰⁵ The proposed legislation created a federal offense for "inflict[ing] any physical injury upon a minor" or "permit[ting] another to inflict any physical injury upon that minor."⁴⁰⁶ In defining physical abuse, the 1993 proposed bill encompassed deprivation of necessities resulting in malnutrition or a failure to thrive.⁴⁰⁷ Although the bill did not adequately address other types of child neglect, the introduction of the bill itself indicates some political support for federal legislation in the area. However, since the statute did not survive a congressional committee's scrutiny in 1993, it is unlikely to gain enough support for congressional enactment.

Overall, a federal child neglect act would fill the void in federal legislation.⁴⁰⁸ Federal prosecutors no longer would be forced to use applicable federal general criminal provisions, (such as assault or homicide) or assimilate state statutes under the Federal Assimilative Crimes Act. Also, federal courts will gain legislative guidance and a unified federal policy.⁴⁰⁹

⁴⁰⁵H.R. 3366, 103d Cong., 1st Sess. § 2259 (1993).

⁴⁰⁶*Id.* This bill further defined physical injury to include "failure to thrive or malnutrition;" and "any other condition which imperils the child's health or welfare . . ." *Id.* This bill also defined "serious physical injury" to include "any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function . . ." *Id.*

⁴⁰⁷*Id.*

⁴⁰⁸Some professionals call for a federal child abuse act. See Austin, *supra* note 81, at 210 (describing the federal legislative void as a "major hole").

⁴⁰⁹Austin, *supra* note 81, at 227.

2. *What an Amendment to Title 18 United States Code Will Not Accomplish*--As stated, without further expansion of jurisdiction over civilians accompanying the forces, an amendment to Title 18 will not provide jurisdiction over civilian offenses abroad. Furthermore, taking jurisdiction would entail various logistical problems in prosecuting dependents for overseas offenses.⁴¹⁰ Based on the decrease in the armed forces assigned overseas and the number of dependents⁴¹¹ such criminal jurisdiction will become less of a priority.

C. *Proposed Executive Branch Initiatives*

By issuing an executive order, the President could amend the UCMJ and add a new Article 134 offense for criminal child neglect. Although the ACCA has found that some cases are not service discrediting, the government could overcome this obstacle with additional proof.⁴¹² Presidential action would not require

⁴¹⁰See McClelland, *supra* note 119, at 201 and sources cited therein.

⁴¹¹DEP'T OF THE UNITED STATES ARMY, PROGRAM ANALYSIS AND EVALUATION DIRECTORATE, *AMERICA'S ARMY: PROJECTING DECISIVE POWER*, 7 (1994). In 1989, 213,000 military personnel were assigned overseas, by 1996, 65,000 military forces are projected to remain overseas. *Id.*

⁴¹²Some judge advocates believe there is potential to successfully argue a clause 1 or 2, Article 134 offense if the government shows proof of a legally enforceable parental duty under state law, or a clear custom of the service, despite the ACCA's decision in *United States v. Wallace*, 33 M.J. 561, 564 (A.C.M.R. 1991). However, to adequately address the void in the law, the proposed UCMJ article or proposed DOD action are the more realistic options and would provide uniform criminal standards. Telephone interview with Colonel John M. Smith,

congressional action and would be an expedient method to provide criminal sanctions for military offenders.

The DOD also could take action alone, without any congressional action. Possible DOD actions include a DOD punitive general order, directive, or regulation (or punitive regulatory provisions) for child neglect. Any DOD action should reflect the provisions in the proposed DOD general order at *Appendix E*. A DOD initiative should include language making the provisions punitive and should describe the three types of child neglect (including criminal deprivation of a child due to harmful environment). Similarly, the individual services could issue punitive regulations or provisions.

1. *What Executive Branch Initiatives Will Accomplish*--Like the proposed UCMJ amendment, any executive branch initiative will only provide punitive sanctions for service members. The executive order would amend the UCMJ in a manner similar to the proposed Title 10 amendment, and would apply at all assignments, decreasing the chance of disparate treatment. The identification of consistent standards is likely to reduce confusion throughout the military community. All installations will have the same standards for parental responsibilities, and consistent, available punitive sanctions.

Chief, Government Appellate Division, United States Army Legal Services Agency (Mar. 29, 1995).

The DOD action would provide the same advantages. As the focal point for military standards, the DOD could quickly disseminate clear standards of parental responsibility throughout the military. Moreover, the DOD could take this action alone, without any required legislative support. This also would reduce the amount of "void-for-vagueness" objections to local punitive regulations and fulfill the constitutional prerequisite of notice prior to prosecution. This option also would allow the armed forces flexibility to change the standards as societal standards change.

2. *What Executive Branch Initiatives Will Not Accomplish--*
The DOD action will not provide criminal sanctions for civilians offenders. Although DOD actions can control DOD employees, parenting is beyond the scope of their employment. Therefore, because parenting is not job related, punitive sanctions against DOD civilians would raise extensive labor issues.

The major difference between an executive order and DOD action is that violation of DOD punitive standards would be a violation of UCMJ, Article 92. As a result, the offense would not carry any enhanced punishment for injury to the child.

VII. Recommended Solution and Why

Ideally, the best recommended solution is legislative action. Realistically, however, to provide uniform criminal

standards throughout DOD, an executive initiative is the logical approach. Amendments to both Title 10 and Title 18 would provide criminal jurisdiction over all offenders in the military community. Although a Title 18 amendment provides criminal liability for both military and civilian offenders, a Title 10 amendment would fill the gap providing criminal sanctions for military offenders outside the United States. Therefore, enactment of both amendments would provide the most *expansive* jurisdiction. Even with the enactment of the proposed amendments to Title 10 and 18, problems with the military's treatment of child neglect would remain. The military still would not have jurisdiction over civilian offenders who violate the law off post or abroad. Additionally, enforcement still would be difficult because the government would charge civilian offenders in the federal court system, an already overburdened system. In any case, due to the lack of political interest, legislative actions are unlikely.

The realistic and recommended response to this problem is action through either presidential initiatives, DOD action, or individual service initiatives. To obtain presidential action, the DOD must rely on other organizations. Therefore, to expeditiously address inadequacies, a punitive DOD order, directive, or regulatory provisions is the most realistic.

The DOD could publish a joint service regulation implementing the family advocacy programs and containing punitive

provisions that reflect those appearing in the proposed DOD action (Appendix E). Easy to amend, a joint regulation would allow flexibility. This DOD action could resolve the inconsistencies within the individual family advocacy programs, such as their inconsistent implementing regulations and lack of centralization. Additionally, DOD action could limit the confusion between any criminal standard for child neglect and the administrative, family advocacy standard of child neglect. Although not extending jurisdiction to civilian offenders, punitive DOD standards could provide flexibility for the military and notice to the entire community. The standards for parental responsibility would not change from installation to installation. Without any congressional action, the DOD alone could issue a joint regulation that provides standards and available sanctions.

Alternatively, the Army should take the lead and provide punitive provisions in Army regulations. Simply adding a punitive provision in the Army implementing regulation for the family advocacy program, AR 608-18,⁴¹³ would provide service-wide standards. Similar to Army Regulation 608-99, *Family Support, Child Custody, and Paternity*,⁴¹⁴ where the army has provided

⁴¹³AR 608-18, *supra* note 41.

⁴¹⁴AR 608-99, *supra* note 312. As early as Nov. 4, 1985, the Army has had a punitive regulation requiring soldiers to provide financial support to family members in specific situations and prohibiting soldiers from violating court orders on child paternity and custody. Alfred F. Arquilla, *Changes in Army Policy on Financial Nonsupport and Parental Kidnapping*, ARMY LAW., June 1987, at 18; Alfred F. Arquilla, *Family Support, Child*

punitive sanctions for failure to pay child support, the army could take the lead with a punitive child neglect provision. At the very least, to expeditiously resolve the most common inconsistencies, the Army should promulgate a punitive regulatory provision; thus providing consistent standards.

VIII. Implementation: What Any Action Could Accomplish

Ideally, any action creating a criminal offense would provide the military with a bargaining tool, and as a result, a basis to establish deferred prosecution agreements with defendants. With an amendment to Title 18, the federal government would gain control over civilian offenders. Part of a deferred prosecution agreement, with any defendant, could include authorization to periodically enter the defendant's house to inspect the condition of the children and the residence; required training, such as parenting classes; and participation in the family advocacy program.

Also, any action would achieve the objective of providing criminal sanctions. All would increase options and place commanders and prosecutors in better positions, while enhancing

Custody, and Paternity, 112 MIL. L. REV. 18 (1986); Telephone interview with Colonel Alfred F. Arquilla, Chief of the Legal Assistance Division, Office of the Judge Advocate General (Mar. 27, 1995); Interview with Major Gregory O. Block, Instructor, Administrative and Civil Law Division, The Judge Advocate General's School, United States Army, in Charlottesville, Virginia (Mar. 9, 1995).

the efforts of the family advocacy programs in preventing child neglect and maintaining service member readiness.

Any action would fulfill the need for uniformity and notice for the uniformed services. Commanders and trial counsel also need consistency and the full realm of options available when a service member commits criminal child neglect. Commanders, trial counsel, service members, and children will benefit from any action providing uniform standards. Commanders will gain the opportunity to choose punitive sanctions when a first time offender commits an egregious offense. Trial counsel will not have to grapple with the charges for nonjudicial punishment or courts-martial. Service members will be on notice, no matter where they are assigned. With so many service members in so many locations, with so many applicable laws, the military should give service members consistent standards and constant notice of their parental duties.

All of the proposed alternatives have one drawback; neither legislative nor executive branch initiatives will remove service members from state jurisdiction. Therefore, the potential inconsistency and state criminal liability still exist. Also, the proposed options will not terminate parental rights or remove the child from the home. Potential initiatives will, however, provide a basis for such action.

IX. Conclusion

The military responds to the problem of child neglect in a disjunctive, ad hoc manner. The military's response is filled with inconsistent state criminal statutes, jurisdictional inconsistencies, and differing punitive installation regulations. While we have family advocacy programs--essentially child protection agencies--the military is missing other options that are available in the civilian sector, criminal sanctions. Like the civilian sector, the military needs both civil child protection programs and criminal standards. Additional punitive options, and uniform criminal standards for child neglect will enhance family advocacy programs.

Failure to fulfill parental responsibilities, as well as inconsistent standards of responsibilities, adversely affect unit readiness and discipline, and military community morale and welfare. Therefore, the military's overall goal should be providing uniform standards, while providing punitive options. As a minimum, the military should provide standards for specific types of child neglect that warrant punitive sanctions; thereby providing standards for parental obligations.

A uniform criminal standard for child neglect would provide notice for the military community, law and order for a disciplined military society, options for commanders and trial counsel, and readiness for our armed forces. The military's

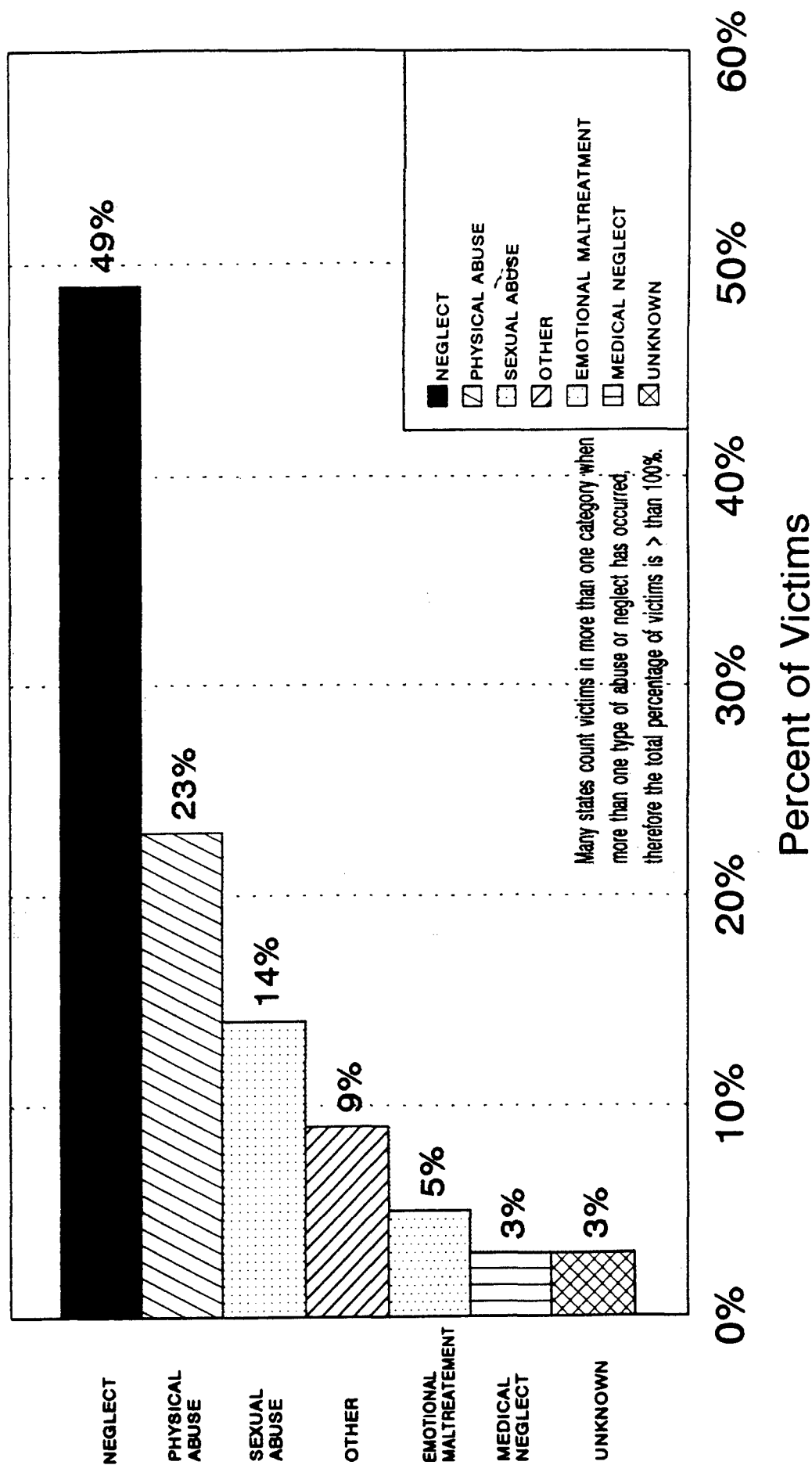
organizational goals highlight the need for such a standard. The military has a *duty* to notify the community of the standard; service members and their families *deserve* notice of the standards; and commanders *need* options. Whether or not military parents agree on the standard, out of fairness all military parents deserve notice of the standards. Such a standard would also support the military's policy to promote the welfare of the military family, by publishing, and possibly raising, the standard of care for children.

The *idealistic* answer to obtaining uniform criminal standards is legislative action. Although unlikely, legislative initiatives would provide the most expansive answer to the problem of child neglect. The *realistic* response is DOD action that expeditiously promulgates a punitive regulatory provision for child neglect and provides uniform standards for parental responsibilities DOD wide. In any case, if nothing else, the Army should provide its soldiers with uniform standards. When dealing with the problem of child neglect, perhaps any action is better than no action.

NATIONAL STATISTICS 1992

VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT

FIGURE 1

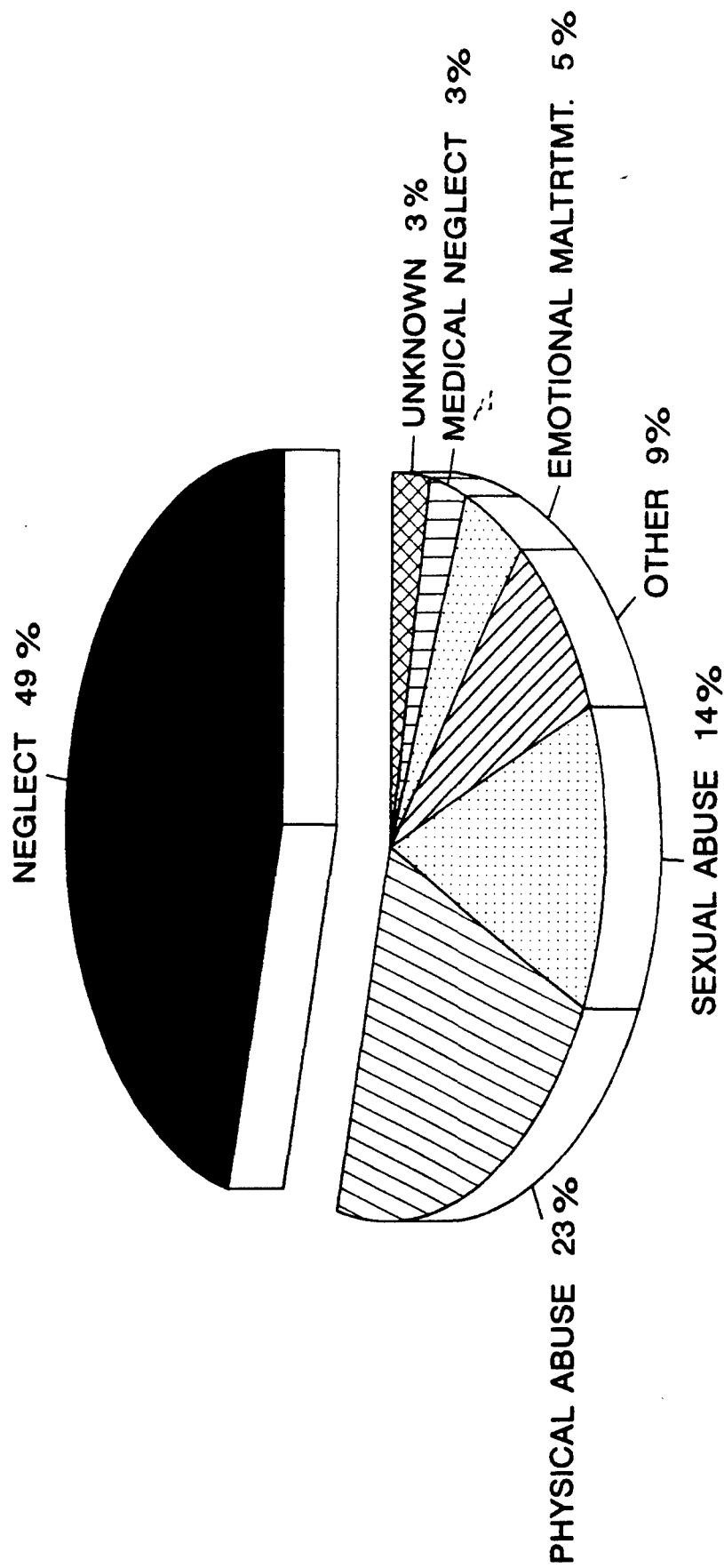


VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT

NATIONAL STATISTICS 1992

TOTAL NUMBER OF VICTIMS=918,263

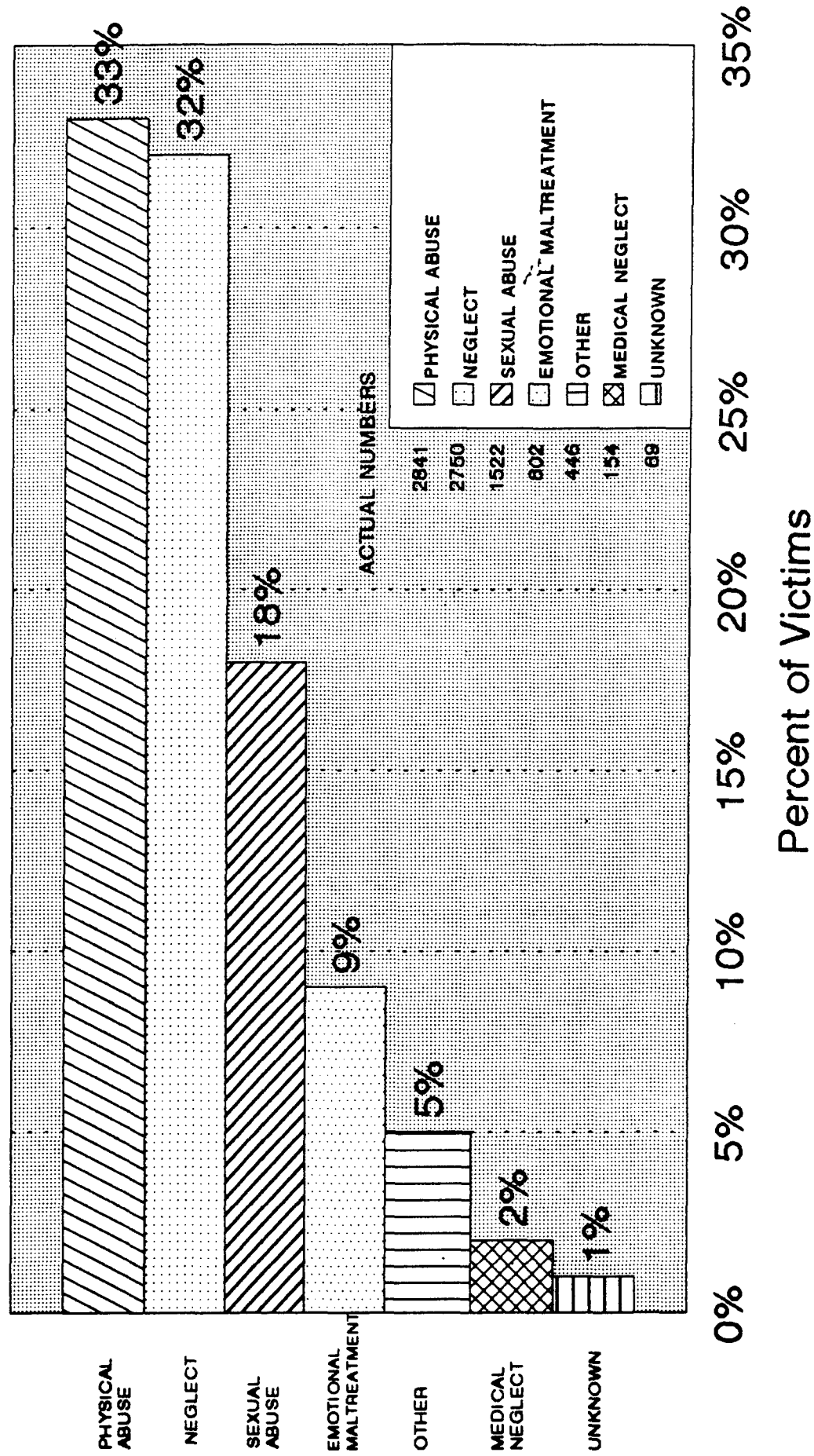
49 STATES REPORTING



Many states count victims in more than one category when more than one type of abuse or neglect has occurred; therefore the total percentage of victims is > than 100%.

VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT ARMED FORCES--CONUS 1992

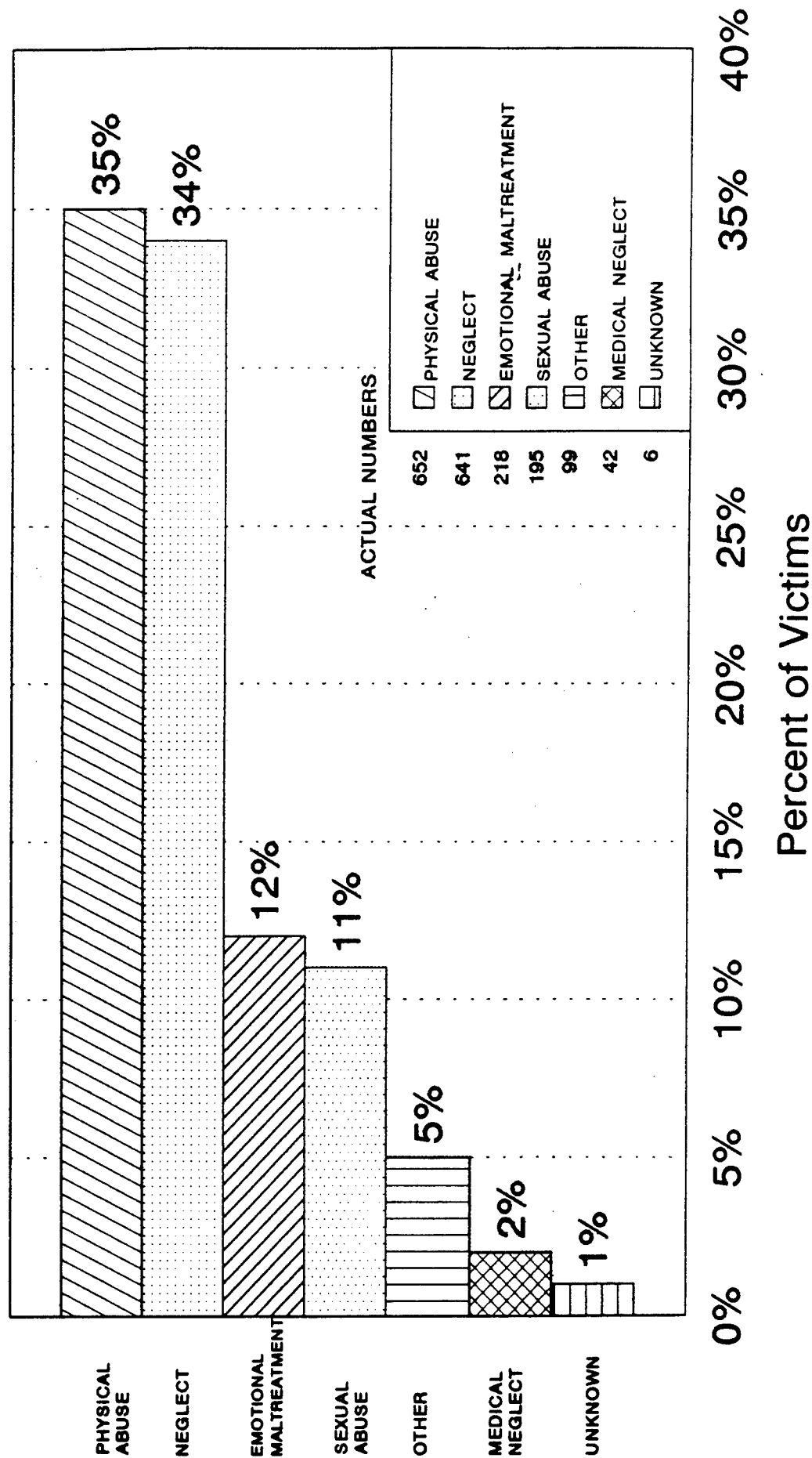
Figure 2



TOTAL NUMBER OF VICTIMS = 8,584

VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT ARMED FORCES--O-CONUS 1992

Figure 3



TOTAL NUMBER OF VICTIMS = 1 853

TABLE 1

DEPARTMENT OF DEFENSE
CHILD NEGLECT STATISTICS

FISCAL YEAR	CHILD POPULATION	TOTAL SUBSTANTIATED CASES OF ABUSE-NEGLECT	TOTAL SUBSTANTIATED CASES OF DEPRIVATION OF NECESSITIES	TOTAL SUBSTANTIATED CASES OF EMOTIONAL MALTREATMENT	EMOTIONAL MALTREATMENT & NEGLECT AS % OF TOTAL
1986	1,580,886	7,904	2,465	410	36%
1987	1,574,677	10,060	3,020	727	37%
1988	1,566,190	9,378	3,012	1,039	43%
1989	1,572,219	10,336	3,876	1,127	48%
1990	1,580,494	9,696	3,382	1,063	46%
1991	1,707,327	10,552	3,993	912	46%
1992	1,643,669	10,251	3,227	1,023	41%

TABLE 2

TYPES OF SUBSTANTIATED CHILD ABUSE & NEGLECT
FISCAL YEAR 1990

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE & NEGLECT
TOTAL	3,772	1,259	3,382	1,063	220	9,696
% OF TOTAL	39%	13%	35%	11%	2%	100%

TABLE 3

TYPES OF SUBSTANTIATED CHILD ABUSE & NEGLECT
FISCAL YEAR 1991

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE & NEGLECT
TOTAL	3,824	1,424	3,993	912	399	10,552
% OF TOTAL	36%	13%	38%	9%	4%	100%

TABLE 4

TYPES OF SUBSTANTIATED CHILD ABUSE & NEGLECT
FISCAL YEAR 1992

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE & NEGLECT
TOTAL	3,957	1,618	3,227	1,023	426	10,251
% OF TOTAL	39%	16%	31%	10%	4%	100%

	CHILD ENDANGERMENT										CHILD ABANDONMENT												NON-SUPPORT/ DEPRIVATION						FAILURE TO ACT		ABUSE			MISCELLANEOUS					
	A1	A2	A3	A4	A5	A6	A7	A8	A9	A10	A11	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12	C1	C2	C3	C4	C5	C6	D1	D2	E1	E2	E3	F1	F2	F3	F4	F5
Alabama											X	X																											
Alaska											X																												
Arizona	X	X	X						X																														
Arkansas					X	X																																	
California	X		X					X																															
Colorado																																							
Connecticut					X	X																																	
Delaware					X	X																																	
Dist. of Columbia											X																												
Florida	X		X																																				
Georgia	X	X																																					
Hawaii							X																																
Idaho			X					X																															
Illinois																																							
Indiana								X																															
Iowa			X																																				
Kansas									X																														
Kentucky									X																														
Louisiana																																							
Maine																																							
Maryland							X																																
Massachusetts																																							
Michigan																																							

"For the index of the specific neglect grounds listed in this chart, see "Key to Chart 1: Grounds of Criminal Child Neglect," on the following page.

KEY TO CHART 1- GROUNDS OF CRIMINAL CHILD NEGLECT

A - CHILD ENDANGERMENT

1. Knowingly cause/permit life/limb endangerment.
2. Knowingly cause/permit health/physical injury/endangerment.
3. Knowingly cause/permit moral welfare imperilment.
4. Knowingly cause/permit harm to emotional/mental health.
5. Knowingly engage in conduct/act creating risk of harm to health/physical welfare; likely to physically injure.
6. Knowingly engage in conduct/act creating risk of serious harm to mental welfare; likely to mentally or morally injure.
7. Knowingly endanger welfare by violating a duty of care/protection/support.
8. Cause/permit child's presence where selling/possessing a controlled substance.
9. Cause placement in situation likely to harm health or cause death.
10. Direct/authorize child to engage in occupation involving risk of danger to life/health.
11. Permit living in deprivation/environment that causes physical/emotional health impairment/in danger.

B - CHILD ABANDONMENT

1. Abandon/desert purposefully/with intent to abandon
2. Desert with intent to abandon -creating substantial risk of physical injury; likely to endanger health.
3. Physically abandon with intent to sever parental/custodial duties/responsibilities.
4. Knowingly leave without supervision without regard for mental/physical health, safety/welfare.
5. Leave in place where child may suffer due to neglect, with intent to abandon.
6. Leave unattended to his own care (includes in vehicles).
7. Abscond/fail to perform contract for board/maintenance
8. Fail to care for and keep control and custody so public/charity support/maintenance required.
9. Exposure (or aid/abet) to highway, street, field house, outhouse elsewhere with intent to abandon.
10. Falsely represent child to orphanage.
11. Fail/refuse to maintain child.
12. Cruelly confine.

KEY TO CHART 1- GROUNDS OF CRIMINAL CHILD NEGLECT (cont.)

C - CRIMINAL NONSUPPORT/DEPRIVATION

1. Fail to provide necessary food, clothing, shelter, lodging, protection from the weather.
2. Fail to provide medical attention.
3. Fail to provide education.
4. Fail to provide care (necessary, parental, physical or other remedial care).
5. Fail to provide supervision.
6. Willfully omit/deprive of necessary sustenance (food, shelter, clothing, medical attention).

D - FAILURE TO TAKE ACTION TO PREVENT ABUSE

1. Permit/condone child engaging in prohibited sex/sexual battery/sexual exploitation/sexual simulation for film; permit use for wanton/improper purpose.
2. Permit abuse (abuse includes sexual abuse, any physical injury); condone/allows another to injure.

E - CHILD ABUSE COMBINED STATUTE

1. Abuse/maltreatment includes to cause injury to life/health, or permit placement in situation that poses a threat of injury.
2. Abuse includes to engage in pattern of conduct resulting in malnourishment, lack of proper medical care, cruel punishment, or mistreatment.
3. Inflict/cause (by conduct) physical injury (physical injury includes failure to thrive, malnutrition or emotional harm).

F - MISCELLANEOUS

1. Cause or intentionally do or fail to do any act resulting in child becoming a neglected child or injury to child.
2. Exposure to hazard/danger (such that child cannot reasonably expect to protect itself or life/health endangered).
3. Cruelly treat by neglect, overwork.
4. Cause/permit home to be resort of lewd drunken, wanton dissolute persons.
5. By neglect/depravity render home an unfit place for a child.

APPENDIX A

ARMY STAFF JUDGE ADVOCATE QUESTIONNAIRE: SUMMARY OF RESPONSES

(Note: This is a compilation of responses to some of the questions that appeared on the survey. Some questions required a commentary and are impossible to summarize. Also, this survey included two parts. This is a summary of only the responses from army judge advocates on the Family Advocacy Management Team.)

T= Total number of responsive answers to that question.

N= Number of responses that provided the answer indicated.

Questionnaires mailed =130	Responses =53	41%
Response returned with blank survey (inapplicable) =3		2%
Responses with 0 cases of child neglect =2		2%

OFFICE OF THE STAFF JUDGE ADVOCATE FAMILY ADVOCACY MANAGEMENT TEAM (FACMT) REPRESENTATIVE

1. How many cases of child neglect involving either soldiers or dependent spouses, on post or off post, were reported in the last three years? T=45

a. 0	N=2	4%	d. 11-15	N=4	9%
b. 1-5	N=6	13%	e. 16-20	N=8	18%
c. 6-10	N=1	2%	f. 21-100	N=16	36%
			g. over 100	N=8	18%

2. Where did the offense allegedly occur?

N= number of responses reflecting the % of cases occurring at locations indicated.

On post	0-25%	N=5	
	26-50%	N=8	
	51-75%	N=11	
	76-100%	N=15	
			AVERAGE= 67% ON POST
Off post	0-25%	N=19	
	26-50%	N=11	
	51-75%	N=5	
	76-100%	N=4	
			AVERAGE= 32% OFF POST

APPENDIX A

ARMY STAFF JUDGE ADVOCATE QUESTIONNAIRE: SUMMARY OF RESPONSES

3. Who conducted the investigation?

N= number of responses reflecting the authority indicated investigated that % of the cases.

a.	FACMT	0-25%	N=12		
		26-50%	N=1	AVERAGE= 43% FACMT	
		51-75%	N=2	INVESTIGATED	
		76-100%	N=8		
b.	*MPs/CID	0-25%	N=13		
		26-50%	N=4	AVERAGE= 34% MPs/CID	
		51-75%	N=1	INVESTIGATED	
		76-100%	N=5		
c.	State/Local Authorities	0-25%	N=15		
	(Other)	26-50%	N=1	AVERAGE= 24%	
		51-75%	N=1	OTHER INVESTIGATED	
		76-100%	N=4		

*Military Police/Criminal Investigation Division

4. What percentage of soldiers was subsequently enrolled in the FACMT program? T=40

a.	0-15%	N=5	13%	d.	46-60%	N=6	15%
b.	16-30%	N=5	13%	e.	61-75%	N=2	5%
c.	31-45%	N=3	8%	f.	76-90%	N=2	5%
				g.	91-100%	N=17	43%

5. What percentage of spouses was subsequently enrolled in the FACMT program? T=36

a.	0-15%	N=5	14%	d.	46-60%	N=6	17%
b.	16-30%	N=5	14%	e.	61-75%	N=3	8%
c.	31-45%	N=3	8%	f.	76-90%	N=5	14%
				g.	90-100%	N=9	25%

APPENDIX A

ARMY STAFF JUDGE ADVOCATE QUESTIONNAIRE: SUMMARY OF RESPONSES

6. Do you have a post policy or regulation that identifies minimal standards for parental responsibility?

T=45

a. Yes	N=31	69%	b. No	N=14	31%
--------	------	-----	-------	------	-----

7. Is it Punitive?

T=31

a. Yes	N=2	6%	b. No	N=29	94%
--------	-----	----	-------	------	-----

8. Have you had any children removed from a soldier's home (on post or off post) due to child neglect?

T=39

a. Yes	N=21	54%	b. No	N=17	46%
--------	------	-----	-------	------	-----

9. If yes, who supervised the removal?

T=22

a. State/Local Authorities	N=9	41%	b. DoD Agency	N=13	59%
----------------------------	-----	-----	---------------	------	-----

10. Does your installation have an agreement with state and local authorities involving your installation's reporting, investigating, and disposing of child abuse and neglect offenses? (data from respondents abroad not applicable)

T=27

a. Yes	N=19	70%	b. No	N=8	30%
--------	------	-----	-------	-----	-----

11. If yes, has your installation experienced any problems with state and local authorities involving your installation's Memorandum of Agreement/Understanding for reporting, investigating, and disposing of child abuse and neglect offenses?

T=15

a. Yes	N=4	27%	b. No	N=11	73%
--------	-----	-----	-------	------	-----

APPENDIX A

ARMY STAFF JUDGE ADVOCATE QUESTIONNAIRE: SUMMARY OF RESPONSES

12. Post policies or regulations (either provided with survey responses or summarized in survey responses) regulated the following areas of parental responsibility:

T=21

Supervision of Children (Abandonment type issues) (including in motor vehicles)	N=20	95%
Safety of Children (Endangerment type issues)	N=12	57%
Duty to Provide Necessities (Deprivation issues)	N=1	5%

****NOTE:** Some installation policies or regulations include two of the above areas; therefore they are counted twice, and the total % exceeds 100.

*****NOTE:** Due to rounding, compiled % indicated in all questions are approximate.

******NOTE:** In questions two and three, raw % numbers from each survey respondent were used to calculate average %'s.

APPENDIX B

A BILL

To amend Chapter 47 of Title 10, United States Code
(the Uniform Code of Military Justice), to provide penalties
for child neglect

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

SECTION 1. SHORT TITLE

This Act may be cited as the "Military Child Neglect Act of
1996"

SECTION 2. CHILD NEGLECT

(a) *In General.*—Chapter 47 of title 10 of the United States Code is
amending by adding the following new paragraph:

"§ XXX. Art. XX. Child Neglect

"(a) Any person subject to this chapter who, as a parent,
guardian, in loco parentis or having a duty imposed by marriage,
court order or recognized state directive, or otherwise having
physical custody or control of a child—

"(1) willfully, negligently or recklessly disregarding that
child's mental or physical health, safety or welfare, knowingly
leaves that child who is under the age of 9 without supervision by
a person over the age of 12 years; or

"(2) (a) willfully, negligently, or recklessly suffers the
life, person or health of that child, a person who has not yet
attained the age of sixteen years, to be injured; or

"(b) willfully, negligently, or recklessly suffers that
child, a person who has not yet attained the age of sixteen years,
to be placed in a situation where its life, person or health is
endangered or likely to be endangered; or

"(3) willfully or negligently deprives or allows to be deprived that child, a person who has not yet attained the age of sixteen years, of necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

"(4) willfully permits that child, a person who has not yet attained the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired.

is guilty of child neglect

"(b) Any person found guilty of child neglect shall be punished as a court-martial may direct.

SECTION. 3 EFFECTIVE DATE

This Act shall take effect on 1996. Nothing contained in this Act shall be construed to make punishable any act done or omitted prior to 1996, which was not punishable when done or omitted.

APPENDIX C

EXECUTIVE ORDER XXXXX AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, and Executive Order No. 12767, it is hereby ordered as follows:

Section 1. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

- a. The following new paragraph is inserted after paragraph XX:
"XX. Article XXX (Child Neglect)

a. Text.

"(a) Any person subject to this chapter who, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or otherwise having physical custody or control of a child-

"(1) willfully, negligently, or recklessly disregarding that child's mental or physical health, safety or welfare, knowingly leaves that child who is under the age of 9 without supervision by a person over the age of 12 years; or

"(2)(a) willfully, negligently, or recklessly suffers the life, person or health of that child, a person who has not yet attained the age of sixteen years, to be injured; or

"(b) willfully, negligently, or recklessly suffers that child, a person who has not yet attained the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered; or

"(3) willfully or negligently deprives or allows to be deprived that child, a person who has not yet attained the age of sixteen years, of the necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

"(4) willfully suffers that child, a person who has not yet attained the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired

is guilty of child neglect and shall be punished as a court-martial may direct.

b. Elements.

(1) Child Abandonment.

(a) That the accused was a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or otherwise had physical custody or control of a certain person;

(b) That the accused willfully, negligently, or recklessly disregarded that person's mental or physical health, safety or welfare;

(c) That the person was then a child under the age of 9 years;

(d) That the accused knew that person was then a child under the age of 9 years; and

(e) That the accused knew he/she was leaving that person without supervision by a person over the age of 12 years.

(Note: When the period of abandonment is 24 hours or more, add the following element)

(f) That person was without supervision by a person over the age of 12 years for a 24 hours or more.

(2) Child Endangerment.

(a) That the accused was a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive or otherwise had physical custody or control of a certain person;

(b) That the accused willfully, negligently, or recklessly suffered the life, person, or health of that person to be injured; OR That the accused willfully, negligently, or recklessly suffered that person to be placed in a situation where its life, person or health is endangered or likely to be endangered; and

(c) That the person was then a child under the age of 16 years.

(3) Criminal Deprivation of a Child (Necessities).

- (a) That the accused was a parent, guardian, in loco parentis, or having a duty imposed by marriage, court order or recognized state directive, otherwise had physical custody or control of a certain person;
- (b) That the accused willfully or negligently deprived, or allowed to be deprived, that person, of necessary food, clothing, shelter, medical attention, education;
- (c) That the deprivation caused the person's physical, mental, or emotional health to be harmed or substantially likely to be harmed; and
- (d) That the person was then a child under the age of 16 years.

(4) Criminal Deprivation of a Child (Environment).

- (a) That the accused was a parent, guardian, in loco parentis, or having a duty imposed by marriage, court order or recognized state directive, otherwise had physical custody or control of a certain person;
- (b) That the accused willfully permitted that person to live in a certain environment;
- (c) That the certain environment caused that person's physical, mental or emotional health to be significantly impaired or to be in danger of significant impairment; and
- (d) That the person was then a child under the age of 16 years.

(Note: When any child neglect offense results in substantial harm to the child's physical, mental or emotional health add the following element)

That the person's physical, mental or emotional health thereby suffered substantial harm.

(Note: When any child neglect offense results in serious bodily injury to the child add the following element)

That the person thereby suffered serious bodily injury.

c. Explanation.

(1) Willfully. As used in this article, "willfully" means intentionally or on purpose.

(2) Negligently. Negligence is the absence of due care. As used in this article, "negligently" means an act or failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the child which a reasonably prudent person would have used under the same or similar circumstances.

(3) **Recklessly.** As used in this article, "recklessly" means a degree of carelessness greater than simple negligence. Recklessness is a negligent act or failure to act combined with a gross, deliberate, or wanton disregard for the foreseeable results to the person, life, or health of the child.

(4) **Suffers.** As used in this article, "suffer" means to allow or permit.

(5) **Substantial harm to the child's physical, mental or emotional health.** As used in this article includes, but is not limited to starvation, failure to thrive, or malnutrition.

(6) **Child Abandonment.**

(a) In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of that child, the trier of fact should consider the following factors:

- (1) the age of the child;
- (2) the number of children left at the location;
- (3) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications
- (4) the duration of time in which the child was left without supervision;
- (5) the condition and location of the place where the child was left without supervision;
- (6) the time of day or night when the child was left without supervision;
- (7) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;
- (8) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or having physical custody or control of the child at the time the child was left without supervision, the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive, or having physical custody or control of the child at the time the child was without supervision;
- (9) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;
- (10) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;
- (11) whether there was food and other provision left for the child;
- (12) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other

person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

(13) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(14) any other factor that would endanger the health or safety of that particular child; and

(15) whether the child was left under the supervision of another person.

(b) *Knowledge.* The offense of child abandonment requires that the accused have actual knowledge that the victim was then a child under the age of 9 years. It also requires that the accused had actual knowledge that he/she was leaving the victim without supervision by a person over the age of 12 years. Actual knowledge may be proved by circumstantial evidence. No other offense under this article includes an actual knowledge element.

d. *Lesser Included Offenses.* None.

e. *Maximum punishment.*

(1) *A child abandonment offense when the period of abandonment is 24 hours or more.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *When a child neglect offense results in substantial harm to the child's physical, mental or emotional health.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *When a child neglect offense results in serious bodily injury to the child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Other cases of child neglect.* Bad Conduct Discharge, forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

f. *Sample Specifications.*

(1) *Child Abandonment.*

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required) on or about _____ 19____, [(as the parent of) (as the guardian of) (in loco parentis of) (having a duty imposed by marriage, court order or recognized state directive to care for) (having physical custody or control of)] _____ who then was and was then known by the accused to be a child under the age of 9 years, (willfully) (recklessly) (negligently) disregard said child's (person's) mental or physical health, safety or welfare, and then wrongfully and knowingly leave said child without

supervision by a person over the age of 12 years [(for a period of 24 hours or more)] [and said child suffered substantial harm to (his)(her) (physical)(mental)(emotional) health] [and said child suffered serious bodily injury, to wit:].

(2) Child Endangerment.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19_____, [(as the parent of)(as the guardian of)(in loco parentis of)(having a duty imposed by marriage, court order or recognized state directive to care for)(having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) (negligently) (recklessly) suffer said child [(to be injured, to wit:)] [(to be placed in a situation where said child's (life) (person) (health) was (likely to be)endangered, to wit:] [and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit:]

(3) Criminal Deprivation of a Child (Necessities).

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19_____, (as the parent of)(as the guardian of)(in loco parentis of)(having a duty imposed by marriage, court order or recognized state directive to care for)(having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) (negligently) (allow to be) deprive(d) said child of necessary (food) (clothing) (shelter)(medical attention)(education) and said deprivation did cause said child's (physical)(mental)(emotional) health (substantially likely) to be harmed [and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit:]

(4) Criminal Deprivation of a Child (Environment).

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19_____, (as the parent of)(as the guardian of)(in loco parentis of)(having a duty imposed by marriage, court order or recognized state directive to care for)(having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) permitted said child to live in a certain environment, to wit: , thereby causing, said child's (physical)(mental)(emotional) health (to be significantly impaired)(in danger of significant impairment) and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit:]

Section 2. These amendments shall take effect on January 21, 1996. Nothing contained in this amendment shall be construed to make punishable any act done or omitted prior to January 21, 1996, which was not punishable when done or omitted.

Section 3. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.

APPENDIX D

A BILL

To amend title 18, United States Code, to provide penalties
for child neglect in the special maritime
and territorial jurisdiction of the United States.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Child Neglect Act of 1996".

SECTION 2. CHILD ABANDONMENT; CHILD ENDANGERMENT; CRIMINAL DEPRIVATION OF A CHILD

(a) IN GENERAL.--chapter 110 of title 18, United States Code,
is amended by adding at the end of the following:

"§ XXXXa. CHILD ABANDONMENT.

"(a) Whoever, in the special maritime and territorial
jurisdiction of the United States, as a parent, guardian, in loco
parentis, or having a duty imposed by marriage, court order or
recognized state directive, or other persons having physical
custody or control of a child--

"(1) with willful, negligent, or reckless disregard for
the mental or physical health, safety or welfare of that child,
knowingly leaves that child who is under the age of 9 without
supervision by a person over the age of 12 years.

"(b) is guilty of child abandonment. The punishment for an
offense under this section is--

"(1) a fine under this title or imprisonment for not more
than 3 months, or both;

"(2) if the period of abandonment is 24 hours or more, a
fine under this title or imprisonment for not more than 6 months,
or both;

"(3) if the offense results in substantial harm to the child's physical, mental or emotional health, a fine under this title or imprisonment for not more than 2 years, or both; or

"(4) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than 5 years, or both.

"(c) In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of that child, the trier of fact should consider the following factors:

"(1) the age of the child;

"(2) the number of children left at the location;

"(3) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications

"(4) the duration of time in which the child was left without supervision;

"(5) the condition and location of the place where the child was left without supervision;

"(6) the time of day or night when the child was left without supervision;

"(7) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

"(8) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child or other person having physical custody or control of the child at the time the child was left without supervision, the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was without supervision;

"(9) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

"(10) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

"(11) whether there was food and other provision left for the child;

"(12) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

"(13) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

"(14) any other factor that would endanger the health or safety of that particular child; and

"(15) whether the child was left under the supervision of another person.

"§ XXXXb. CHILD ENDANGERMENT.

"(a) Whoever, in the special maritime and territorial jurisdiction of the United States, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or other persons having physical custody or control of a child--

"(1) willfully, negligently, or recklessly causes or permits the life, person or health of that child to be injured,

or

"(2) willfully, negligently, or recklessly causes or permits that child to be placed in such a situation where its life, person or health is endangered or likely to be endangered

is guilty of child endangerment and shall be punished as provided in subsection (b) of this section.

"(b) The punishment for an offense under this section is--

"(1) a fine under this title or imprisonment for not more than 6 months, or both;

"(2) if the offense results in substantial harm to the child's physical, mental or emotional health, a fine under this title or imprisonment for not more than 2 years, or both; or

"(3) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than 5 years, or both.

"(c) As used in this section--

"(1) the term 'child' a person who has not yet attained the age of 16 years

"(2) the phrase 'substantial harm to the child's physical, mental or emotional health,' includes, but is not limited to: starvation or failure to thrive or malnutrition

§ XXXXc. CRIMINAL DEPRIVATION OF A CHILD.

"(a) Whoever, in the special maritime and territorial jurisdiction of the United States, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or other persons having physical custody or control of a child--

"(1) willfully or negligently deprives that child or allows that child to be deprived of necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health,

"(2) is guilty of criminal deprivation of a child and shall be punished as provided in subsection (b) of this section.

"(b) The punishment for an offense under this section is--

"(1) a fine under this title or imprisonment for not more than 6 months, or both;

"(2) if the offense results in substantial harm or impairment to the child's physical, mental or emotional health, a fine under this title or imprisonment for not more than 2 years, or both; or

"(3) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than 5 years, or both.

"(c) As used in this section--

"(1) the term 'child' a person who has not yet attained the age of 16 years

"(2) the phrase 'substantial harm to the child's physical, mental or emotional health,' includes, but is not limited to: starvation or failure to thrive or malnutrition

"(3) 'necessary education' means education as required by laws of the state

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by adding at the end the following new item:

"XXXXa. Child Abandonment."

"XXXXb. Child Endangerment."

"XXXXc. Criminal Deprivation of a Child."

APPENDIX E

DEPARTMENT OF DEFENSE GENERAL ORDER

January 1996
GO NUMBER 64001.x

SUBJECT: Child Neglect

References:

- (a) DOD Directive 6400.1, Family Advocacy Program, June 23, 1992
- (b) Public Law 101-647, "Crime Control Act of 1990, November 29, 1990
- (c) Public Law 97-291, "Victim and Witness Protection Act of 1982," October 12, 1982
- (d) DOD 5025.1-M, "DOD Directives System Procedures," December 1990, authorized by DOD Directive 5025.1, December 1988
- (e) DOD Directive 1030.1, "Victim and Witness Assistance," August 20, 1984
- (f) DOD Directive 6025.6, "Licensure of DOD Health Care Personnel," June 6, 1988
- (g) Title 10, United States Code, §§ 801-946
- (h) DOD Directive 6025.11, "DOD Health Care Provider Credentials Review and Clinical Privileging," May 20, 1988
- (i) Public Law 101-189, Title XV, Military Child Care Act of 1989," November 29, 1989

A. PURPOSE

1. This general order provides a single source of standards for parental responsibilities in determining child neglect. It publishes specific definitions of child abandonment, child endangerment, and deprivation of a child, for all DOD military service members.

2. A violation of this order implements punitive sanctions for military service members who commit child neglect.

APPENDIX E

DEPARTMENT OF DEFENSE GENERAL ORDER

3. This order does not supersede other DOD directives and service regulations pertaining to the family advocacy program except to the extent that child neglect is defined for criminal liability and made punitive. This order does not in any way modify or change, other DOD Directives and service regulations pertaining to the family advocacy program. The definitions and guidance in previous family advocacy program directives and service regulations will still serve as the basis for case reporting and substantiation, and program implementation.

4. A violation of this order does not create any right or benefit, substantive or procedural, enforceable at law by any person against the U.S., its agencies, its officers or employees, or any other person.

B. APPLICABILITY AND SCOPE

This general order:

1. Applies to the Office of the Secretary of Defense (OSD) and the Military Departments. Military members assigned to the OSD, Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, and the Defense Agencies [hereinafter referred to collectively as "the DOD components"] shall be covered by this directive and the regulations and policies issued by their parent military department to implement this order.

2. Applies to the U.S. Coast Guard, an agency under the Department of Transportation (DOT), by agreement with the DOT. This order shall also apply to the Coast Guard when it is operating as a military service in the Navy.

3. Encompasses all persons eligible to receive treatment in military medical treatment facilities.

4. The prohibitions and requirements set forth herein are general orders and apply to all military members without further implementation. Violations may result in prosecution under the UCMJ (reference (g)), as well as adverse administrative action and other adverse action authorized by the United States Code or federal regulations. Penalties for violating this order include the full range of statutory and regulatory sanctions, both criminal and administrative. This order may be the basis for a commissioned, warrant, or noncommissioned officer to issue a lawful order to a military service member.

APPENDIX E

DEPARTMENT OF DEFENSE GENERAL ORDER

C. DEFINITIONS

1. Military Service Member or Personnel.

(a) Any active duty Regular or Reserve military officer, including warrant officers.

(b) Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

(c) Any Reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

(d) Any Reserve or National Guard member while on inactive duty for training or while earning retirement points, pursuant to title 10, United States Code, or while engaged in any activity related to the performance of a federal duty or function.

2. Child Neglect. Acts or omissions that fall into the conduct described in section F below.

3. Willfully. intentionally or on purpose.

4. Negligently. An act or failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the child which a reasonably prudent person would have used under the same or similar circumstances.

5. Recklessly. A degree of carelessness greater than simple negligence. Recklessness is a negligent act or failure to act combined with a gross, deliberate, or wanton disregard for the foreseeable results to the person, life, or health of the child.

6. Substantial harm to the child's physical, mental or emotional health. As used in this order includes, but is not limited to starvation, failure to thrive, or malnutrition.

7. Willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child. In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child, (under child abandonment in section F below) the commander should consider the following factors:

(a) the age of the child;

(b) the number of children left at the location;

APPENDIX E
DEPARTMENT OF DEFENSE
GENERAL ORDER

(c) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

(d) the duration of time in which the child was left without supervision;

(e) the condition and location of the place where the child was left without supervision;

(f) the time of day or night when the child was left without supervision;

(g) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

(h) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was left without supervision; the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was without supervision;

(i) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

(j) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

(k) whether there was food and other provision left for the child;

(l) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

(m) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(n) any other factor that would endanger the health or safety of that particular child; and

(o) whether the child was left under the supervision of another person.

D. DOD POLICY

It is DOD policy to:

1. prevent child neglect involving persons covered by section B above and deter those individuals from committing such acts falling under the category of child neglect.

APPENDIX E
DEPARTMENT OF DEFENSE
GENERAL ORDER

2. Provide comprehensive and coordinated DOD-wide standards to identify child neglect and allow a method for criminal sanctions in the military.

3. Enhance family and unit morale, readiness, discipline by providing clear standards of parental responsibility.

4. Ensure parental responsibility for children thereby promoting the healthy development, well-being, and safety of children in the military community.

5. Cooperate with civilian authorities in efforts to prevent, child neglect, deter persons from committing child neglect, and punish offenders.

6. Provide for violations of the standards set out herein to be punitive and where appropriate subject violators to disciplinary or administrative sanctions set out in the UCMJ or implementing service regulations.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Force Management and Personnel) shall monitor compliance with this general order.

2. The Secretaries of Military Departments shall:

(a) provide education and training to key personnel on this policy and effective measures to alleviate problems associated with child neglect.

(b) Ensure that military families living in the civilian community, as well as those living on the installation are aware of this order.

(c) Ensure commanders at all levels coordinate with the family advocacy case review committees prior to adverse administrative action or criminal sanctions.

F. PROHIBITED CONDUCT

No military service member, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive or otherwise having physical custody or control of a child shall:

APPENDIX E

DEPARTMENT OF DEFENSE GENERAL ORDER

1. with willful, negligent or reckless disregard for that child's mental or physical health, safety or welfare, knowingly leave that child who is under the age of 9 without supervision by a person over the age of 12 years (in so doing they commit child abandonment); or

2. willfully, negligently, or recklessly:

(a) allow or permit the life, person or health of that child, a person who has not yet attained the age of sixteen years, to be injured; or

(b) allow or permit that child, a person who has not yet attained the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered (conduct described in 2(a) and (b) above is considered child endangerment); or

3. willfully or negligently deprive or allow to be deprived that child, a person who has not yet attained the age of sixteen years, of the necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

4. willfully permit or allow that child, a person who has not yet attained the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired. (conduct described in 3 and 4 above is considered deprivation of a child).

G. EFFECTIVE DATE AND IMPLEMENTATION

This order is effective immediately.